LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U. S.
FILED
OCT 9 1950
CHARLES ELMORE CROPLEY
CLERK

BRIEF ON MERITS

No. 93

Supreme Court of the United States

October Term 1949

IRVING FEINER,

Petitioner,

—*vs.*—

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Writ of Certiorari to the Court of Appeals State of New York

BRIEF FOR THE RESPONDENT.

JESSE E. CANTOR,
District Attorney, Onondaga County, N. Y.

DAN J. KELLY,
Assistant District Attorney,
Onondaga County, N. Y.

F. N. SPAULDING LAW PRINTING CO., SYRACUSE, N. Y.

INDEX

	PAGE
Opinions Below	124-139
Jurisdiction	2
Question Presented	2
Statute involved	2
Statement	4
Facts	5
Summary of Argument	8
Argument	
Section 722 of the New York State Penal Law discussed	11
Evidence offered by the People clearly shows acts and language and possible disturbances tending to a breach of the peace	13
Testimony offered by the Police is corroborated by testimony of defense witnesses	23
Duty rested with trial judge to determine accurate version among conflicting stories of witnesses	26
It is immaterial whether any breach of the peace actually occured or whether persons affected by defendant's conduct was actually annoyed	47
There has been no violation of the Constitutional rights of defendant nor does his conviction violate either the Fourteenth Amendment or the First Amendment of the Federal Constitution	61
The Courts both State and Federal, while upholding the rights of freedom of speech, of assembly and of the press have always recognized the necessity of proper curbs on these freedoms	65

The Reasons relied upon by petitioner are not based on true facts of the record and cases cited in support of the Writ were decided on grounds entirely different from those that lie in the within conviction . 96
The use of a loud speaker was never an issue in the trial 122
Conclusion 123

New York Cases Cited in Brief,

People v. Arcidiaco, 156 Misc. 461, 462 .....43, 61
People v. Berkowitz, 132 Misc. 744, 745 .....44, 48
Bridges Hardware Company v. Horowitz, 93 N. Y. S. 2d 323, 328 68
People v. Friedman, 14 N. Y. S. 2d 389, 392, 393....13, 53
People v. Galpern, 259 N. Y. 279, 281, 282, 284 ..51, 53, 54
People v. Hipple, 262 N. Y. 242, 243 .....12, 13, 50, 58
People v. Hussock, 23 N. Y. S. 2d 520, 521-523 .....12, 57
People v. Lipschitz, 120 Misc. 633, 635 .....40, 47
People v. Lumbo, 8 N. Y. S. 2d 744, 745 46
People v. McWilliams, 22 N. Y. S. 2d 571, 574, 575, 577. 59
People v. Most, 171 N. Y. 423, 429 .....67, 93
People v. Nesin, 179 A. D. 869, 870 50
People v. Nixon, 248 N. Y. 182, 186, 188 ..40, 42, 45, 52, 53
People v. Richards, 31 N. Y. S. 2d 457, 461 85
People v. Squires, 135 Misc. 214, 215 .....13, 40, 42, 48
Stanton v. Board of Education of N. Y., 76 N. Y. S. 2d 559, 561, 564 77
People v. Tepperman, 151 Misc. 810, 811, 812 37
People (Grahl) v. Vogt, 178 Misc. 446, 447, 448 48
People v. Ward, 159 Misc. 328, 330 51
People v. Winters, 48 N. Y. S. 2d 230, 232 84
People v. Yergan, 164 Misc. 83, 85, 86 .....12, 39, 47

New York Cases Referred to in Citations

People v. Berman, 156 Misc. 463, 465 61
People v. Cohen, 136 N. Y. S. 163, 165 40
People v. Huyck, 171 Misc. 467, 468 12
People v. Kiernan, 26 N. Y. S. 2d, 291, 301-303 12
People v. Montgomery, 17 N. Y. S. 2d 71 12
People v. Perry, 265 N. Y. 362, 364, 365 12
People v. Pieri, 269 N. Y. 315, 321, 322 .....12, 61
People v. Rotundo, 160 Misc. 696, 697 13
People v. Sinclair, 86 Misc. 426, 436 .....40, 43
People v. Smith, 114 A. D. 513, 517 41
People v. Trombino, 238 A. D. 61, 65 41

United States Supreme Court Cases (Cited or discussed.)

American Communications Association C. I. O. et al vs. Douds
United Steel Workers of America, et. al. vs. National Labor Relations Board, 70 Supreme Court Reporter, 674, 683, 685 71
Bridge Hardware Co. vs. Horowitz, 93 N. Y. S. 2nd 323 68
Board of Education v. Barnett, 319 U. S. 624 112
Cantwell v. Connecticut, 310 U. S. 296, 308 102
Chaplinsky v. New Hampshire, 315 U. S. 568, 571, 572 85
United States v. L. Cohen Grocery Co., 225 U. S. 81 .. 74
Connelly v. General Construction Co., 269 U. S. 385 .. 114
People v. Gitlow, 266 U. S. 652, 666-670 66
DeJonge v. Oregon, 229 U. S. 353, 364 112
Gilbert v. Minnesota, 254 U. S. 325, 332, 333 .....67, 91

Hague v. C. I. O., 307 U. S. 496 ..... 59, 60, 109
Herendon v. Lowery, 301 U. S. 242, 256, 258 119
Jamison v. Texas, 318 U. S. 413 106
M. Kraus & Bros. v. United States, 327 U. S. 614 118
Lanzetta v. New Jersey, 306 U. S. 451 116
Lovell v. Griffin, 303 U. S. 44 108
Marsh v. Alabama, 326 U. S. 501 113
Murdock v. Pennsylvania, 319 U. S. 105 111
Patterson v. Colorado, 205 U. S. 454, 462 ..... 67, 90
Robertson v. Baldwin, 165 U. S. 275, 281 ..... 67, 90
Saia v. New York, 334 U. S. 558 120
Schenck v. United States, 249 U. S. 47, 52 ..... 92, 106
Schneider v. State, 308 U. S. 147 105
Stromberg v. California, 283 U. S. 359 117
Thomas v. Collins, 323 U. S. 516 110
Thornhill v. Alabama, 310 U. S. 88 110
Terminiello v. Chicago, 337 U. S. 1, 13, 14, 24, 25, 27, 28, 29, 31, 33, 34, 37 ..... 98.
Whitney v. California, 274 U. S. 357, 371 ..... 55, 89
Winters v. New York, 333 U. S. 507 122

Other Cases Cited or Discussed.

Alabama State Federation of Labor v. McAdory, 18 So. 2d 810 (Alabama) 822 82
Bowe v. Secretary of Commission, 69 N. E. 2d 115 (Massachusetts) 129 78
Emden v. Vitz, 198 P. 2d 696 (California) 700 80
Hill v. State ex rel Watson, 19 So. 2nd 857 (Florida) 859, 861, 862 75
Kovcas v. Cooper, 50 A 2nd 451 (New Jersey) 452 80
Krasner v. State, 26 So. 2nd 519 (Alabama) 523 81

IN THE

Supreme Court of the United States

October Term 1950

No. 93

IRVING FEINER,

Petitioner,

—*vs.*—

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

---

BRIEF FOR THE RESPONDENT IN OPPOSITION TO WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

OPINIONS BELOW

The Opinion of the Court of Appeals of the State of New York is reported at 300 N. Y. page 391
See also Transcript of Records page 153
See also within 129-139

The Opinion of Leo W. Breed, County Judge of Onondaga County, New York, was not reported
See Transcript of Record, page 145
See within 125-128
The Opinion of Hon. William H. Bamerick, Judge, Court of Special Sessions, City of Syracuse, New York, was not reported
See record, pages 136 to 141
See also within 30-37

JURISDICTION

The Judgment of the Court of Appeals of the State of New York affirming the judgment appealed from was made and entered at Albany, New York on the 2nd day of March, 1950. A petition for a Writ of Certiorari was filed with this court by petitioner on the 7th day of March, 1950, and the petition was granted by this court on the 29th day of May, 1950.

QUESTION PRESENTED

Whether the conviction of the petitioner, Irving Feiner, in the Court of Special Sessions of the City of Syracuse, County of Onondaga, State of New York, on the charge of Disorderly Conduct in the violation of Section 722 of the Penal Law of the State of New York was an abridgment of petitioner's rights of freedom of speech and freedom of assembly as guaranteed by the First Amendment and the Fourteenth Amendment of the Federal Constitution.

STATUTE INVOLVED

The Statute involved is Section 722 of the Penal Law of the State of New York and is as follows:

"Section 722. DISORDERLY CONDUCT.

Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:

1. Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior;

2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;

3. Congregages with others on a public street and refuses to move on when ordered by the police;

4. By his actions causes a crowd to collect, except when lawfully addressing such a crowd;

5. Shouts or makes a noise either outside or inside a building during the night time to the annoyance or disturbance of any considerable number of persons;

6. Interferes with any person in any place by jostling against such person or unnecessarily crowding him or by placing a hand in the proximity of such person's pocket, pocketbook or handbag;

7. Stations himself on the public streets or follows pedestrians for the purpose of soliciting alms, or who solicits alms on the public streets unlawfully;

8. Frequents or loiters about any public place soliciting men for the purpose of committing a crime against nature or other lewdness;

9. Causes a disturbance in any street car, railroad car, omnibus or other public conveyance, by running through it, climbing through windows or upon the seats, or otherwise annoying passengers or employees therein;

10. Stands on sidewalks or street corners and makes insulting remarks to or about passing pedestrians or annoys such pedestrians;

11. Is engaged in some illegal occupation or who bears an evil reputation and with an unlawful purpose consorts with thieves and criminals or frequents unlawful resorts.

12. In any prosecution under sub-division eleven of this section the fact the defendant is engaged in an illegal occupation or bears an evil reputation and is found consorting with persons of like evil reputation, thieves or criminals shall be prima facie evidence that such consorting was for an unlawful purpose.

STATEMENT.

This is a Writ of Certiorari granted May 29th, 1950, to review the judgment of the Court of Appeals of the State of New York entered March 2nd, 1950, affirming the judgment of conviction of the petitioner. The appeal to the Court of Appeals of the State of New York was on the certificate of Hon. Edmund H. Lewis, Judge of the Court of Appeals, certifying an appeal to the Court of Appeals under date of August 15th, 1949, from the affirmance by the Hon. Leo W. Breed, County Judge of Onondaga County, New York, on August 5th, 1949, of the conviction of the above named petitioner on the 6th day of May, 1949, in the Court of Special Sessions of the City of Syracuse, New

York, following a trial had in said court on the 5th and 6th days of May, 1949, before the Hon. William H. Bamerick, Judge of the Court of Special Sessions, at the close of which said trial the petitioner was found guilty of the offense of Disorderly conduct in violation of Section 722, Sub-division 2 of the Penal Law of the State of New York and on which said conviction he was, on the 9th day of May, 1949, sentenced to a term of thirty days in the Onondaga County Penitentiary and from which sentence appeal was taken. The petitioner was admitted to bail pending the appeal to the County Court of Onondaga County which said court affirmed the conviction on August 5th, 1949. The order of affirmance being entered in the Onondaga County Clerk's Office on August 8th, 1949. The case was certified to the Court of Appeals as above stated. Both the appellant, the petitioner herein, and the People submitted briefs in January, 1950, and by unanimous decision the Court on March 2nd, 1950, affirmed the judgment of conviction. On March 8th, 1950, Judge Lewis continued the bail until not later than April 3rd, 1950, to enable the petitioner to apply for the Writ of Certiorari herein, which petition was filed with the Clerk of the Supreme Court of the United States on the 17th day of March, 1950, and the petition for Writ of Certiorai granted May 29th, 1950, and to which said Writ the within brief is directed.

FACTS.

On the 8th day of March, 1949, the defendant-appellant was addressing an open-air meeting under the auspices of the Young Progessives of America at the intersection of South McBride Street and Harrison Street in the City of Syracuse. The purpose of the meeting was, as evidence

discloses, to recruit an audience for another meeting to be held at a later hour on the same day at the Hotel Syracuse in the City of Syracuse, New York, which meeting was to be addressed by one John Rogge. A permit previously given to hold the meeting in the Auditorium of Madison School had been revoked by Syracuse city officials and the place of the meeting had been changed to the ballroom of the Hotel Syracuse of Syracuse, New York.

At approximately six-thirty P. M. on the 8th day of March, 1949, a call, the source of which is unknown, was received at the Syracuse Police Station by Captain Irving Blanchard, the captain on duty, following which call, he detailed two police officers in separate cars to the intersection of South McBride Street and Harrison Street in Syracuse, New York, to investigate and report back to him. Upon the arrival of the police officers at this street intersection, they found a crowd of approximately seventy-five persons assembled on the west side of South McBride Street and to the north of the intersecting street, Harrison. A car was parked on the west side of South McBride Street some thirty-five or forty feet north of Harrison Street. This car was equipped with a public address system with loud speakers. A man, later identified as Irving Feiner, was standing on a box to the immediate west of the car and between the west curb of South McBride Street and the sidewalk on the west side of the same street. Mr. Feiner, using a hand microphone, was addressing the crowd through the public address system attached to the parked car.

He was, when the officers arrived, referring to John Rogge and the speech which he would make at the Hotel Syracuse that evening. Without any apparent connection

with the John Rogge speech, Irving Feiner lauched an attack on public officials in general and indulged in a bitter attack on the Mayor of the City of Syracuse, the Mayor of New York City, the President of the United States, the American Legion and officials of the Fifteenth Ward of Syracuse, New York, in which ward his address was being made. The meeting being addressed was composed of both colored and white people and the location was in a section of the city where a colored population predominates.

Among other things, the defendant-appellant, Irving Feiner, asserted that the Mayor of the City was indifferent to the needs and wants of the colored people who were not being given their rights as citizens, stressing throughout what he termed the indifference of public officials to their plight and in this connection he attacked public officials generally. The officers listening to the speech of Feiner patiently. They made no interference until such time as they observed from the action and comment of the crowd that a continuance in the same vein might lead to a breach of the peace. They recognized the right of free assembly and free speech even though intemperate and insulting and made no move to interfere until the results of his remarks were made evident by the restlessness and comment of the audience. Complaints were made by members of the crowd who were listeners to the speech as to how long they must stand for such remarks and the police were questioned as to whether or not they couldn't handle the situation, pedestrians were being forced into the street, vehicular traffic was being interferred with and the crowd was evidencing bad temper. The officers then mixed with the crowd and observed pushing, shoving and angry mutterings. One list-

ener going so far as to tell the police that if they, the police, didn't get the speaker off the box that he, himself, would do so. With the crowd in an evidently bad mood, Feiner made a plea to the colored people to rise in arms and fight for their rights. The officers, sensing the inflammatory effect of this last urging by Feiner, worked their way through the crowd to the speaker and requested him to cease his address but he continued speaking and the crowd closed in around the officers. After waiting about one whole minute the officer in charge again told Feiner to cease his speech but Feiner made no compliance. Finally, the officer demanded that Feiner get down, which he did, still speaking into the microphone and wisecracking as to the arrival of the law. Feiner was placed under arrest, charged with disorderly conduct in violation of Section 722, Subdivision 2 of the Penal Law. He was tried, convicted and sentenced as above stated and appeal taken first to the County Court of Onondaga County, later to the Court of Appeals of the State of New York and now a Writ of Certiorari to the Court of Appeals of the State of New York has been granted by the Supreme Court of the United States.

SUMMARY OF ARGUMENT.

1. That the petitioner, Irving Feiner, with intent to provoke, a breach of the peace and by words, acts and behavior by which a breach of the peace might be occasioned did commit the offense of Disorderly Conduct by the use of offensive, disorderly, abusive and insulting language conduct and behavior, that he did annoy, disturb, interfere with, obstruct and be offensive to others; that he did congregate with others on a public street and refused to abide by proper police direction; and that he did cause a crowd

to collect and by his speech and conduct so agitated that crowd as to render a breach of the peace imminent.

2. That his acts, utterances and behavior were evils of the very nature which the statute under which he was convicted was designed to prevent and that he did violate the statute.

3. That the statute under which he was convicted was not unconstitutional nor did its enforcement deprive petitioner of his liberty of freedom of assembly or freedom of speech.

4. That the statute is not invalid for the reason that it vests discretionary power in the public.

5. That the statute was violated even though no actual breach of the peace occurred.

6. That the testimony of the police officers clearly shows acts, language and disturbances tending to a breach of the peace in violation of the section under which he was charged and convicted.

7. That the testimony of the police officers is corroborated by the defense witnesses and shows that the police officers were confronted with a tense situation whereby a breach of the peace was actually threatened.

8. That the trial judge recognized every constitutional right of the petitioner and found him guilty not for their exercise of these rights but for their abuse.

9. That the duty rested on the judge of the Court of Special Sessions to determine the accurate version among conflicting stories of witnesses for the People and witness-

es for the defendant. That he reached his decision fairly and justly and this decision should not be disturbed.

10. That the Courts of the State of New York have long and consistently held that the trial judge is the best judge of all the facts, having before him all the witnesses and being in a position to observe the demeanor of every witness and evaluate their testimony and that his findings, unless clearly against the weight of evidence, will not be disturbed.

11. That it is immaterial whether any breach of the peace actually occurred or whether the persons affected by it were actually annoyed.

12. That the officers had a right to arrest the petitioner to protect persons from threatened wrong and to prevent disorder.

13. That there has been no violation of the constitutional rights of the defendant nor does his conviction violate either the First Amendment or the Fourteenth Amendment.

14. That our Courts, both State and Federal, while upholding the rights of freedom of speech, of assembly and of the press, have always recognized the necessity of proper curbs on these freedoms.

15. The principle involved in the cases cited by petitioner in support of this Writ, is in every case entirely different from that which lies in the within conviction and all cases were decided on constitutional principles and grounds not present here.

16. In the within case there was no previous restraint or prohibition.

17. The use of a loud speaker was not an issue at the trial or a factor in the trial judge finding the petitioner guilty.

Section of Penal law of the State of New York under which Petitioner was convicted and holding of New York State Courts in respect thereto.

The petitioner, Irving Feiner, was convicted under Section 722 of the Penal Law of the State of New York entitled Disorderly Conduct.

Section 722, Disorderly Conduct, in part is as follows:

"Any person who with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:

1. Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior;
2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;
3. Congregates with others on a public street and refuses to move on when ordered by the police;
4. By his actions causes a crowd to collect, except when lawfully addressing such a crowd."

Section 722 of the Penal Law of the State of New York contains eight other subdivisions none of which are pertinent to the within petition.

The Court of Appeals of the State of New York has held that under Section 722 of the Penal Law it is not necessary to specify in the complaint the particular subdivision alleged to have been violated but that it is sufficient if the defendant be convicted of the violation of any subdivision of said Section. See People v. Hipple, 263 N. Y. 242; 188 N. E. 725.

This Section 722 it has been held is not unconstitutional in that it depriyes defendant of his liberty of assembly, freedom of speech, and of the press, and of his liberty to worship according to dictates of his conscience; People v. Hussock, 23 N. Y. S. 2nd 520. The Courts of this State have in the same decision held that Subdivision 3 of Section 722 is not invalid for the reason that it vests arbitrary and discretionary power in police, thereby leaving the question of violation to whim of police. The Courts of the State of New York, have repeatedly and in clear language stated that Breach of Peace is an offense well known to the common law. That it is a disturbance of public order by an act of violence *or by an act likely to produce violence* or which by causing consternation and alarm, disturbs the peace and quiet of the community. People v. Perry, 265 N. Y. 362; People v. Pierci, 269 N. Y. 315; People v. Huyck, 171 Misc. 467; People v. Montgomery, 17 N. Y. S. 2nd 71; People v. Kiernan, 26 N. Y. S. 2nd 291. Our courts have held that conduct which tends to breach the peace is, within certain limitations, a matter of discretion on part of the court. People v. Yergen, 164 Misc. 83.

The courts of this State have repeatedly held that in order to prove the offense of disorderly conduct tending to a breach of the peace *there need be no actual breach of*

the peace and proof of annoyance need not be established and that even if the defendant did not intend to provoke a breach of the peace, it is sufficient if his behavior was such that by it a breach of the peace might be occasioned. People v. Squires, 135 Misc. 214; People v. Yergen, 164 Misc. 82. That persons congregating on a public street may be dispersed, although their intent is orderly and inoffensive. People v. Hipple, 263 N. Y. 242; People v. Freidman, 14 N. Y. S. 2nd 389. That attending a public meeting, calling leader vituperative names, throwing the audience into confusion, constitutes disorderly conduct. People v. Rotundo, 160 Misc. 696.

A resume of the evidence offered by the People and submitted to the New York State Court of Appeals for their review clearly shows acts and language and possible disturbance tending to a breach of the peace.

In questioning officers and other witnesses, the following questions and answers clearly indicate a violation of the section under which he was charged for they spell out a situation whereby a breach of the peace might easily be occasioned.

Page 18 of the record:

"Q. Tell us exactly what you observed when you got there? A. When I arrived at the northwest corner, there was a crowd of approximately seventy-five people gathered—colored people and white—about forty-five feet back there was a car parked with a man standing on a large wooden box speaking through a hand microphone."

Page 19 of the record:

"Q. Tell us in substance what he said? A. He was speaking of John Rogge and the talk he was going to give that night. He called Mayor Costello a 'champagné sipping bum' and President Truman a 'bum' he referred to the American Legion as 'Nazi Gestapo Agents'. He also said the Fifteenth Ward was run by corrupt politicians and that horse rooms were operating.

Q. Did you observe the temperament of the crowd? A. Yes."

Page 20 of the record:

"A. I observed that there was angry mutterings throughout the crowd and the crowd hampered the use of the sidewalk.

Q. Where was the crowd with reference to the sidewalk? A. The crowd was on the sidewalk.

Q. Did you observe any pedestrians? A. Yes.

Q. What were they doing? A. Trying to use the sidewalk, but they had to go out in the road because of the crowd."

Page 21 of the record:

"Q. Was the walk obstructed? A. Yes.

Q. Where did the pedestrians go? A. Into the road.

Q. When these pedestrians went out in the road were they forced to use the highway used for vehicles? A. Yes.

Q. What did you do in reference to the crowd? A. I tried to get them up off the road.

Q. I ask you whether or not you mingled with the crowd? A. Yes.

Q. What did you observe and hear as you mingled with the crowd? A. I observed that there was pushing and shoving and I had trouble getting through some portion of the crowd—

Page 22 of the record:

I also heard angry mutterings especially when the defendant continued to speak after I requested him to stop.

Q. What, if anything, did the people say? A. When Mr. Feiner stated that the negro people did not have equal rights and should rise up and fight, one man came up to me and said, 'If you don't get that son of a bitch off I will go over and get him off myself'."

Page 23 of the record:

"By the Court:

Q. Did he speak loud or in a conversational tone? A. No, he was mad at the time."

Page 24 of the record:

"Q. I think your testimony, officer, was that the speaker was appealing to the colored people in particular? A. Yes, that's right."

Page 25 of the record:

"Q. Describe the voice the speaker used—was it low or high? A. It was loud—high pitched.

Q. Tell us again what his words were in reference to this arming? A. He said the negroes didn't have equal rights and they should rise up and fight for them.

Q. And immediately following what did you do? A. At that time when the gentleman came up and made the statement I testified to, I figured it had gone far enough so I went over to Mr. Feiner.

Q. When you got over to him what did you say or do?

Page 26 of the record:

"A. First, I asked him to get down off the box and he ignored me and kept right on talking to the crowd.

Q. How many times did you ask him to get down off the box? A. Once.

Q. How long did you wait after you asked him? A. About a minute.

Q. And he kept on talking to the crowd? A. Yes.

Q. And did he have a microphone he was talking through? A. Yes, in his left hand.

Q. After you requested him to get down off the box and he didn't, what did you do? A. I demanded that he get down.

Q. What did he then do? A. He did not get down.

Q. He still refused to get down? A. Yes.

Q. What was the condition of the crowd at that time? A. They were all coming closer and getting around my neck to see what was going to happen.

Q. When he did not get down, what did you do? A. I told him he was under arrest and he had to get down off the box.

Q. Tell us about those side-play remarks that were made? A. When he finally did get down off the box, he did not put the microphone away so that what was said by me and him could be heard by the crowd—so he told them the law had arrived and would take over.

Q. He still refused your request to cease speaking? A. Yes."

On cross examination by Mr. Greenberg, Page 32 of the record:

"By the Court:

Q. These people you say were walking down the roadway? A. Yes, they had to, they couldn't use the sidewalk."

Page 34 of the record. By Mr. Greenberg:

"Q. Did you include these four people as part of the ten that was forced into the road? A. Yes, they told me they were—they said they had to use the road.

Q. Because of the crowd on the west side of McBride Street? A. Yes."

Page 35 of the record:

"Q. Did any of these ten people come up to you and complain about the situation? A. Some made remarks about the police force not being able to handle the crowd."

Page 37 of the record:

"Q. During the time you were on the west side of the street, did you have any difficulty walking back and forth? A. Yes, in a portion of the area."

Page 38 of the record:

"Q. From your observation, while mingling with the crowd, are you prepared to state that there wasn't room enough for people to walk back and forth? A. Yes—if they wanted to push around there was room."

Page 40 of the record:

"Q. What did the defendant say with reference to Mayor Costello? A. He said he was a 'champagne sipping bum' and that he would not speak for the negro people and he wouldn't have him speak for them."

Page 41 of the record:

"Q. Did anyone do anything beside mutter? A. Some of the crowd were pushing and shoving at that stage but not to excess.

Q. You did not regard it as a disturbance? A. Not at that time but we stepped in to prevent it from becoming a fight. After all, there were angry muttering and pushing."

Page 42 of the record:

"Q. You said that the defendant said to rise up in arms and fight? A. Yes, he said fight for your rights.

Q. Did he at any time say rise up and arm? A. He said, 'in arms'.

Q. But you never got the impression that he was sending anyone home for weapons? A. I got an impression and I took action on it, that is all that was necessary.

Q. What impression did you get? A. That he was trying to arouse the negro people against the whites.

Q. And you went over for the purpose of arresting him? A. No, I did not.

Q. What was your purpose? A. To get him to break the congregation up, that is the reason.

Q. To stop the meeting?"

Page 43 of the record:

"A. Yes.

Q. What was the first thing you said to him? A. I said, 'Will you get down off the box', and he just looked and kept right on talking to the crowd.

Q. Did you then make another statement to him? A. Yes, after I waited a little while.

Q. What did you next say to the defendant? A. I told him to get off the box, and he still did not get down—then I demanded that he get down and he said, 'The law has arrived'; he said that through the microphone; 'The law has arrived and I suppose they will take over now'.

Q. You say you asked him three times to get down off the box? A. I asked him to get down once, I told him to get down the second time and demanded the third time."

Page 44 of the record:

By Mr. Kelly redirect:

"Q. And you had to repeat your request several times and finally take this man in custody in order to get him to desist? A. Yes."

On examination of Officer Cook. Page 47 of the record:

"Q. Tell us what you heard—what was said by this speaker? A. He was making remarks about certain people—certain public officials. He called Mayor Costello 'a champagne sipping bum'. He called President Truman a bum and he told the negroes to rise up and fight for their rights."

Page 48 of the record:

"Q. Did you observe whether there were people passing north or south on McBride Street using

that thoroughfare or the sidewalk? A. They could not use the sidewalk.

Q. What did you observe in reference to the pedestrians going north and south at that point? A. They had to walk around into the road—they could not pass on the sidewalk.

Q. When they went out into the road did that bring them into the travel portion of the highway used for vehicular traffic? A. Yes."

Page 49 of the record:

"Q. Do you recall anything else about the traffic that night? A. Well as I drove on South McBride Street and went past the crowd, I had to slow down pretty near to a stop at that point.

Q. What did you observe as to the attitude of the crowd? A. They were kind of restless.

Q. Tell us just what the crowd was doing?"

Page 50 of the record:

"A. Milling around back and forth—and a couple of times I heard someone say they did not see why they had to put up with that kind of stuff in the neighborhood.

Q. What happened to the pedestrians on the street? A. They had to go around in the road—they could not get by on the sidewalk.

Q. What did he say? A. 'If you don't take that son of a bitch off there I will take him off myself'.

Q. What was the general attitude of the crowd? A. They were getting to the point where they would be unruly."

Page 51 of the record:

"Q. What did Feiner do when Flynn asked him

to get down off the box? A. He kept right on talking."

Page 52 of the record:

"By the Court:

Q. What else was said, Officer, that you can recall? A. I know he said the negroes should rise up in arms and fight for their rights.

By Mr. Kelly:

Q. Did you notice the attitude of the crowd after that statement? A. Yes, they seemed to mill around a little then.

Q. Were they as well behaved after that remark as they were before? A. It stirred up a little excitement."

On cross examination by Mr. Greenberg. Page 58 of the record:

"Q. Did you have any trouble getting through the crowd yourself? A. I did have a little difficulty, yes."

Page 59 of the record:

"Q. So that no one complained about having to walk in the road, isn't that true? A. Well, there was a couple of people in the crowd that said, 'How long have we got to put up with this'."

Page 60 of the record:

"Q. You heard some say, 'How long do we have to put up with this?' How many said that? A. Probably three that I heard.

Q. Did they say that to you? A. Two of them said it to me."

Page 62 of the record:

"Q. We heard you say that before—what else did he say in reference to Mayor Costello? A. I think he said the Mayor was out of town at the time attending a party or some celebration and he made a statement like, 'Do you think that champagne sipping bum would help you,' something like that.

Q. What else did he say? A. He made reference to the negroes—that they didn't have equal rights. He said the only way they would get their rights would be to rise up in arms and fight."

Page 64 of the record:

"By the Court:

Q. He asked him once? A. Yes. He asked him to get down the first time; he told him to get down the second, and demanded the third.

Q. Did Feiner at any time say he would not get off the box? A. Well, he kept right on talking.

Q. How long a time elapsed from the time Flynn first asked Feiner to get off the box until he was placed under arrest? A. Maybe four or five minutes."

In view of the language used, the aspersions cast and the very apparent unrest in the crowd and despite the right of free speech and free assembly which was not questioned by the officers, still the effect on the crowd whether intentional or otherwise on the part of the speaker clearly spelled out a picture where trouble was imminent and disorder could most easily follow. The officers were not precipitate in their action and the whole scene before them presented a situation where action to prevent disorder was thoroughly warranted and justifiable. The picture before

them cannot be duplicated by any record and who can say that as police officers, guardians of the public peace they should have done less to preserve public order. It was a good piece of excellent police work on the part of two officers who acted very conservatively to avoid a real threatened breach of the peace.

The story as related by the police is to a most marked degree corroborated by the defense witnesses and shows that the police officers were confronted with a tense situation where a breach of the peace was actually threatened. This same evidence was before the New York State Court of Appeals.

The witness Carter on direct examination. Page 75 of the record:

"Q. What did you observe as the police officers went from their cars across the street to the speaker's stand? A. *When they got to the speaker's stand it took me some time to work my way up because the people started to collect around it when they saw the officers there.*" (Italics ours.)

Page 77 of the record:

"Q. Did he make any reference to Mayor Costello in regard to his sipping champagne? A. He said that Mayor Costello was too busy sipping champagne in New Orleans to be concerned with the housing in Syracuse."

Page 81 of the record:

"Q. The police were not bothering you? A. I expected it.

Q. You expected the police to interfere? A. Yes.

Q. And why did you expect that? A. Because

it's been the expected thing at any function of the Young Progressives of America."

Page 84 of the record:

"Redirect by Mr. Greenberg:

Q. Did you observe any mutterings on the part of the crowd? A. I observed only one man muttering.

Q. Did you see that man go to the police? A. Yes."

Page 85 of the record:

"Q. What happened when the police arrived on that side of the street where the speaker was? A. Well,—first *I worked my way through* where I could see what was going on better.

Q. Why did you have to work your way through? A. Because I anticipated this.

Q. I don't care what you anticipated. A. Well—as soon as the officers arrived over there *the people began to crowd around the officers and the defendant*, the whole crowd immediately surrounded them." (Italics ours.)

Page 86 of the record:

"Q. Go through or by pass or whatever you want to call it. A. Well, *the people were about four deep in a circle.*" (Italics ours.)

Page 97 of the record:

"Sammy Jamison direct:

Q. How long did you remain at the corner? A. About five minutes."

Page 98 of the record:

"Q. You don't know how many people were at the meeting before you got there? A. No.

Q. Nor how many people were there after you left? A. No.

Q. And you don't know what was said by the defendant before you got there? A. No.

Q. Nor what was said after you left? A. No."

Page 113 of the record:

"Testimony of Larry Little. By the Court:

Q. What did you hear him say? A. I heard him say a lot of things. He spoke of the violation of civil rights, he spoke of the Ingraham case and the case of the veterans who fought in the South—he spoke of the Trenton Six and he spoke of this case in question of the meeting in Madison Street School. He gave details on these things."

Page 114 of the record:

"Q. What did he say about Mayor Costello? A. He mentioned about his being down in Florida, I believe, drinking champagne, he said he did not have time to look after the housing in Syracuse but he did have time to drink champagne."

Page 115 of the record:

"Q. Were you present at the meeting at the time the police officer came across the street? A. No."

Page 116 of the record:

"On cross examination:

Q. You don't know what the officer did from the time you left the meeting until you returned? A. No."

The police version of a milling crowd and the difficulty with which they moved through this crowd is amply corroborated and the effect of the speaker's words on the crowd

is likewise corroborated by the defense witnesses who were present and observing and they admit that they expected police interference and clearly shows that the police interference was justifiable in the interest of preserving public order for under all circumstances a breach of the peace might well have been occasioned.

The police were impartial observers, they had a picture of the whole situation, they were in a position to sense danger, they could and did measure the temparment of the crowd and acted calmly to avert an open breach of the peace.

The duty rested on the Judge of the Court of Special Sessions to determine the accurate version among conflicting stories of witnesses for people and for defendant and his decision should not be disturbed. The following was before the New York State Court of Appeals for their consideration.

Whether or not there was a breach of the peace or a threatened breach of the peace within the Statute was a question of fact for the Magistrate who heard the case to decide. In fact all that is involved here is a question of fact and whether the opinion of the Magistrate was a sound one.

The Magistrate before whom this case was tried is the best judge of the credibility of the testimony brought out. He was in a position to observe their bias, prejudice, motive or interest, to study the materiality of their testimony and to form a decision from all the facts before him more accurately than can be placed before any Appellate Court on a written record. When the testimony of witnesses is

conflicting the Madgistrate before whom the trial is held is the best judge of the ultimate truth. He has the picture as a whole to a degree that cannot be duplicated by a record. Can what he observed be questioned as to facts on which his decision was based? Judge Bamerick recognized every right of the defendant as to freedom of speech, freedom of assembly, freedom to express views distasteful to others, the right to use the streets as a public forum and the right to use a loud speaker and in his decision did not consider them as violations. He confined himself only to the acts under all circumstances tending to a breach of the peace.

The picture before him is best reproduced in his own words, when, at the close of the People's case, Judge Bamerick said, on page 71 of the record:

> "The basis of the action here, is not whether or not Disorderly Conduct actually occurred, but whether or not the circumstances furnished the occasion for a possible act or acts that would come within the classification of Disorderly Conduct. The question is whether the combination of circumstances there, the fact of the meeting; the talk being delivered over the loud speaking apparatus, which in and of itself is perfectly proper; the attitude of the crowd as testified to by Officer Flynn; the angry muttering; the expression of this one man who by that statement, indicated his attitude; and the remarks that the officers testified to that were overheard in this crowd, the question is, whether or not with this combination of circumstances there was a possible occasion for the Disorderly Conduct as the officers appraised the situation there. I think that

is the point here. If the combination of these things created a situation wherein the Officers concluded that there was danger that a situation might arise that could involve disorderly conduct, then I would think that the officers would be not only acting within the realm of their duty, but I think it would be good judgment on the part of the officers to step in and try to avoid and head off any such development as that.

I think that the attitude of the man who made the remark indicating how he felt climaxes these other things; this appeal that was being made by the defendant at that time to these people to rise up with arms and fight."

The Court further said:

"I think the implication and the fair inference to be drawn from that would be such as to cause the officers to feel that a possible occasion of disorderly act was present."

Also at the close of the defendant's case Judge Bamerick expressed himself as follows, on page 131 of the record:

"You take the position that the officer when he crossed the street on his way to where the defendant was speaking; that the officer, on his way across the street did not have in his mind to arrest the defendant that, that is a conclusion here. What I have in mind is this—it's possible, is it not, that a police officer may witness certain acts and hear certain talk that would or could be a basis for a charge of disorderly conduct? He might be a very patient type of officer who, notwithstanding all that

had transpired before, decided, after crossing the street, and by the use of his good judgment that the arrest was justifiable.

I don't believe the fact that the officer testified that he did not have in mind to do anything about this meeting, so far as making an arrest was concerned, when he was crossing the street or when he first spoke to the defendant is conclusive. That is my position.

Whether or not the arrest was proper depends not on what the officer had in his mind, but it depends on what action took place there and upon the evidence that has been presented here as to what actually took place."

On page 133 of the record the Court further said:

"Mr. Greenberg, I accept those principles—I have read all those cases you cited, so now we get right back to the motion to dismiss which you made a couple of days ago, where in those cases I told you that the points that are raised are not appropriate points in this procedure. Let me repeat to you again, it isn't the fact that a sound truck was used—we don't question that; it isn't the fact that the crowd, so far as numbers are concerned gathered at this point. That is something the law holds is perfectly proper."

On page 133 of the record the Court further said:

"The question here, is what was said and what was done? And it doesn't make any difference whatever was said, was said with a loud speaker or not. There are acts and conduct an individual

can engage in when you don't even have to have a crowd gathered around which would justify a charge of disorderly conduct. The question is, what did this defendant say and do at that particular time and the Court must determine whether those facts, concerning what the defendant did or said, are sufficient to support the charge."

And on page 136 through 141 of the record the Court further said:

"Mr. Feiner, you have been charged with the offense of Disorderly Conduct, arising out of the meeting on the corner of South McBride and Harrison Streets on the night of March 8th, 1949, which was addressed by you over a loud speaking system.

Now, you have had a fair trial; you have been ably defended by good counsel, that is a right that is afforded everyone in this country, regardless of his position or his race or situation in life. That is a priceless heritage; that is something that is foreign to some of these ideologies in some of the places in this world and that some folks in this country seem to like and seem to endorse.

Now, awhile ago, I think on the 26th of March, a very estimable citizen of this town; a man who commands the respect of every individual who has ever had any contact with him or who knows anything about him delivered a talk here in town at a certain place, and I would like to summarize briefly what this outstanding citizen of this town had to say. He spoke on the freedom of speech; something that is prized very highly; something that is talked about very generally nowadays. That, too, is one

of the priceless heritages we have in this country, and which we would like to preserve. It is something our forefathers fought and bled for, and they set up this system of equal rights for everyone, including you and including me; and on that subject, this man that I have spoken to you about, had this to say:

'The importance of Freedom of Speech, for which our fathers fought and died for is a very, very important right. Freedom of Speech,' he said, 'is a right which must not be abused in public any more than in private. Our citizens should be protected and should be permitted to exercise their civil liberties, and Freedom of Speech is a very precious liberty. However, when these liberties are abused they endanger our national security. Then this Freedom must be controlled.'

Continuing, he said something about Communism, the mention of which has been avoided here, so I will omit that.

He maintains that people who advocate change by violence, and who divide a nation to conquer, and pit man against man, and class against class and race against race and color against color, and religion gainst religion, would be denied the right of freedom of speech.

Now, the man who delivered that talk; that outstanding citizen is Rabbi Benjamin Friedman, and he delivered that talk in the Temple of the Society of Concord in this city, of which he is the head.

I think that is a good, sound, sensible philosophy. I think our citizens should be permitted to exercise those liberties that Rabbi Friedman spoke about;

the freedom of speech and the numerous other freedoms you have heard a good deal about, subject, however, to some regard for the rights of others; subject to other people's convenience; subject to other people's wishes.

Even though what I am saying may sort of weary you, as the last gesture you made would seem to indicate, it may be that what I say has no meaning whatever for you. But these thoughts and these ideas are so important to the welfare of the country, that even though what I say wearies you, I am going to keep right on saying it.

I say that this freedom must be subject to the regard for the rights of others and to the reasonable exercise of the police powers which is recognized in our system of government as an important adjunct to the regulation of our affairs; and then again, to the use of whatever reasonable restraint the law imposes.

In other words, we can't have absolute rights; we can't have the absolute right to go out and use the streets or to enjoy any of these freedoms that so many people talk about today. No, it's not an absolute right. Every right and law must be exercised with some regard to the rights of others.

Now, on the 8th day of March of this year, you were addressing a number of people on the corner of South McBride and Harrison Street, on the evening of that day. As I gather it, you were talking about a meeting that was to be held at some other place, and which was to be addressed by a man named John Rogge.

Mario Rossi, said in his column in the Post-Standard, that this man, John Rogge, was connected with a very important department of the National Government at Washington. He was in the inner circle, and while remaining there, everything was all right. He was agreeable to the program; he found nothing wrong with the way the affairs of this government were conducted. But the minute he got out of the government, and he was outside of the circle, then it was something different. As long as Rogge could not be in the circle, then, according to Rossi, there was to be no circle.

So, you were talking over the loud speaker on this evening in question when a call, according to the evidence, came to Police Headquarters, as a result of which two police officers were dispatched to the point where you were speaking. And after arriving on the scene there, the officers made certain observations, and according to their testimony, they spent some twenty minutes or twenty-five minutes more or less (that is not so important) listening and observing.

Now, there is no question about the right of any citizen, including yourself, to use a sound truck for the purpose of delivering an address, and I have no dispute or differences with any of the decisions of the United States Supreme Court or any court on that subject. You had a perfect right to appear there and to use that implement, the loud speaker. You had a right to have it in the street. There is no question about that. But bearing in mind what I said a few minutes ago, quoting Rabbi Friedman;

that right has to be conducted within certain restraints; and subject to reasonable police regulations and the exercise of police power to see that no disorderly conduct arises, and that the rights of others are not violated.

The officers say, and they so testified, that they stood there during this period of time on the opposite side of the street, and they heard you call Mayor Costello and Mayor O'Dwyer and President Truman the names you heard testified to.

Now, it is conceded by your Counsel, that that might be considered bad taste; that might be disrespectful, even though, so far as the exercise of that particular right is concerned, to call people names, we will assume you had a right to do it.

I don't think that was the sensible or the proper or the decent way in which a good citizen should operate. Of course that is disputed by you, but I am inclined to go along with the officers, because what they say is in so many respects so close to what your witnesses have testified to that I am impressed by that fact.

The manner in which you spoke of the American Legion, that too, was something so unnecessary, and so uncalled for, and so disrespectful toward a great organization that has a great record, and has great men in its ranks, and which urges and fights that we maintain this system of government that some other people are so ready to destroy.

I don't think, even though you were within your strict legal right, in addressing the American Legion the way you did, I don't think that is an attribute of good citizenship.

Now, the officers say there were other things; they say there was a crowd of seventy-five or eighty people gathered there; that the space between the curb and the wall of the building was so taken up with the number of people that it was next to impossible to find free passage; that it was necessary for people attempting to pass up or down on that side of the street to go out into the roadway where vehicular traffic made it appear to the officers that some situation might result from that, whether dangerous or what, they noted that. They also came across the street, as they testified, and mingled with the crowd. They say there was pushing and muttering, indicating a state of unrest. They heard remarks from three different men in that group, indicating a frame of mind which could be disturbing. They were asked as to how long you were going to be permitted to talk. One man came across the street and said to Officer Flynn, 'if you don't get that so-and-so off there, I will go over and get him down myself.' The officers acted on these appeals at the last stage, after hearing you stress the inequalities and the unfair things you claim you were disturbed about. They then heard you appeal to these people to stand up, and in arms or with arms, and to fight.

Now, under those circumstances I think the officers were fully justified in feeling that a situation was developing which could very very easily result in a serious disorder. I think the officers were very patient up to that time. I think that on the basis of the evidence here that you deliberately agitated

and that in every way that you could, you goaded these officers to action. They were right there on the opposite side of the street; you knew they were there. Your own witnesses who were there at the corner testified that the officers were there on the opposite side of the street. And you kept right on talking about racial inequalities, with this muttering; this angry muttering, which, according to the officers, made them feel that a situation was developing and which they finally decided called for some action.

Now, they came across the street and they asked you to get down off the box, but before that—your own witnesses have testified to that same story with a slight variance; I am referring now to that part of the testimony of the police officers regarding the statement attributed to you, to rise up and fight. Your own witnesses say, yes, you did appeal to these people to rise up and fight, but so far as the 'arming' is concerned, again according to your witnesses, it was simply a case of 'arm in arm' and walking away in that fashion. According to your witnesses there were only twenty-five persons there, and one of your witnesses says there were ten of your own people there. You certainly were not appealing to them over the loud speaker. I am impressed by what the officers say on that score. I think they had every reason in the world to believe, on the basis of the facts that they have testified to, that something serious was about to happen. And then the officer asked you to get down off the box, and he asked you again, and then one of the officers

says he took you by the arm or reached for you. Three times you had to be requested to get off the box. I think that all those facts that have been testified to here are sufficient to sustain the charge of Disorderly Conduct.

Now, let me tell you one other thing, my boy, and this may be a surprise to you. I don't bear the slightest ill-will toward you. I haven't the slightest feeling; I haven't any feeling toward any man or woman in the world. You are a human being endowed with the dignity and rights of any other human being. I have just as much respect for you as for anyone else, but I haven't much respect for the philosophy you endorce or for the remarks you made on that night in question. I think that talk of yours was designed to do the very things that Rabbi Friedman has spoken about; to line up class against class and race against race, and that philosophy of yours will never prevail in this country. I am sorry to see you here—I regret to take this position. I find on the facts that you are guilty as charged in the Information and Warrant."

The People of the State of New York, Respondent, vs. Helen Tepperman, Appellant, Court of Special Sessions, City of New York, Appellate Part, First Judicial Department, June 4, 1934, 151 Misc. page 810.

"The duty to determine the accurate version among conflicting stories of the deponent officer,

witnesses and defendant, rested on the magistrate and his findings will not be disturbed by an appellate court."

Kernochan, J., on page 811 said:

"This is an appeal from a conviction charging the defendant with disorderly conduct tending to a breach of the peace in that on the 19th day of April, 1933, the appellant was in front of 245 Revington Street, using threatening, abusive and insulting behavior with intent to provoke a breach of the peace and whereby a breach of the peace might be occasioned. * * * We still have left that *she used threatening, abusive and insulting behavior, whereby a breach of the peace might be occasioned;* and that she scratched and punched the deponent and caused a crowd to collect. * * * *The testimony of the officer and of the appellant and her witnesses was conflicting.* This conflict the magistrate decided in favor of the officer and against the appellant. *It was the duty of the magistrate to decide this question of fact and his findings will not be disturbed by the appellate court,* * * * " (Italics ours.)

Kernochan, J., on page 812, further said:

"The next important question to decide is did the officer arrest her for picketing or even attempt to do so. He certainly did not act on his own initiative, for when the proprietor of the bakery told him the appellant was not a baker, the officer said, 'I will go and ask her. If you will be the complainant I will take her to the station house'. He then spoke to the appellant, and said: 'You will have to come

over to the station house with me.' At this time the testimony shows that the appellant did not resist but simply said: 'I won't talk over there, you will have to call the wagon.' He then said, 'Will you please go inside until I can call the wagon.' Immediately after this the appellant scratched the officer in the face and he says, 'smacked me in the eye.' This is the disorderly conduct charge complained of and it appears that it was this that caused the arrest by the officer. The many cases quoted by the appellant's attorney are all based on the assumption that she was resisting an unlawful arrest. In my opinion the testimony of the officer does not support this and a clear case of disorderly conduct has been proved by the evidence. Judgment affirmed."

This case is strikingly similar to the case on appeal in that a request on the part of the police officer, disregarded by the defendant, finally provoked the arrest.

The People of the State of New York, Complainant, vs. Anna Yergan, Defendant, City Magistrate's Court of New York, Fifth District, August 4, 1937, 164 Misc. p. 83.

This was a motion in arrest of judgment after the defendant had been found guilty of Disorderly Conduct in violation of Subdivision 2 of Section 722 of the Penal Law. The motion was denied.

Bromberger, City Magistrate, in his opinion, says on page 85:

"'Mr. Justice Bijur (People v. Lipschitz, 120 Misc. 633), quoting Judge Holmes, succinctly thus establishes a rule governing disorderly conduct: 'In offenses of this kind the standard is that of what Judge Holmes in his 'Common Law' calls the 'average member of the community' observing the 'current morality.'

Conduct which tends to a breach of the peace is, within certain limitations, a matter of discretion on the part of the magistrate. And this must necessarily be so if law, order and ordinary decency in so large a metropolis as the City of New York are to be maintained. (People v. Lipschitz, 120 Misc. 633; Matter of Twelve Commitments, People v. Nixon, 248 N. Y. 182).

It is immaterial whether any breach of the peace actually occurred or whether the persons affected by the defendant's conduct were actually annoyed. (People v. Lipschitz, supra; People v. Squires, 135 Misc. 214; People v. Sinclair, 86 id. 426; Cobb on Inferior Criminal Courts Act p. 136; and cases there cited.)

The words 'tending to a breach of the peace' or 'by which a breach of the peace may be occasioned' mean such behavior on the part of one which might be resented either forcibly or by loud and boisterous language, regardless of what action, in fact, is taken by those who are subject to it. (People v. Cohen, 136 N. Y. Supp. 163)"

Bromberger, J., on p. 86, further said:

"In determining whether or not the conduct is of a disorderly character within the purview of the statute, the court may take into consideration all the surrounding circumstances; the place or places where the offense occurred; the time of the day or night; the manner in which it occurred; the lack of previous acquaintance of the parties with each other; the repetitious and systematic conduct of the defendant, and all other elements presented by the testimony.

It may also be observed that while the court in determining the guilt of this defendant before it did not take into consideration the fact that she failed to introduce any testimony in her own behalf or failed to take the stand, it nevertheless directs attention to the principle, well established in this State, that while no such inference of guilt may be drawn from the failure of the defendant to take the stand, the court is warranted in taking the facts and circumstances which, if innocent, she might have controverted and explained, most strongly against her. (People v. Smith, 114 App. Div. 513; appeal dismissed, 187 N. Y. 557; People v. Trombino, 238 App. Div. 61; affd., 262 N. Y. 689.)"

The People of the State of New York, Respondent, v. Frank Squires, Appellant, Court of Special Sessions, City of New York, Appellate Part, First Judicial Department, New York County, November 15th, 1929, Misc. 135, p. 214.

In this case the defendant had been convicted in the Fourth District Magistrate's Court, Borough of Manhattan, for disorderly conduct tending to a breach of the peace.

Herbert, J., on p. 215 said:

"The sole question presented on this appeal is whether the opinion of the magistrate was a 'sound' one, (Cobb, supra.) 'The discretion confided to a magistrate cannot be without limits. The act complained of must at least be one which reasonably does tend to a breach of the peace.' (People v. Nixon, 248 N. Y. 182.)

That the learned magistrate believed that the acts of the defendant violated either one of the sections is apparent from the conviction of the defendant, and we think that he was justified in coming to that conclusion. The Legislature defined as disorderly conduct any act whereby a breach of the peace may be occasioned which annoys, disturbs, interferes with, obstructs or may be offensive to others. (Penal Law, Sec. 722, subd. 2.)

In order to prove the crime of disorderly conduct tending to a breach of the peace there need be no

actual breach of the peace and proof of annoyance need not be established. (Cobb, supra, p. 136, and cases cited.) 'But even if the defendant did not intend to provoke a breach of the peace, it is sufficient, as we have seen, to bring him within the statute if his behavior was such that by it a breach of the peace might be occasioned.' (People v. Sinclair, 86 Misc. 426, at p. 436.)" (Italics ours.)

The People of the State of New York, Respondent, vs. Salvatore Arcidiaco, and another, Appellants, Court of Special Sessions, City of New York, Appellate Part, First Department, 156 Misc. p. 461.

Salomon, J., on page 461, said:

"The defendants are charged with disorderly conduct under subdivision 11 of section 722 of the Penal Law in that the defendants did unlawfully and with intent to provoke a breach of the peace and whereby a breach of the peace may be occasioned, did on or about June fifth and thereafter and on various occasions until June twenty-eighth consort with each other for an unlawful purpose. The defendants are individuals who bear evil reputations.

We are satisfied from a reading of the testimony in this case that the magistrate, before whom the case was tried was justified and warranted in finding from the evidence, adduced before him that the defendants were criminal and evil reputation and consorted with each other for an unlawful purpose.

We will not overrule or disturb the findings of the magistrate in this case.

The magistrate had before him all the witnesses and of course was in a position to observe their demeanor and of each and every witness." (Italics ours.)

In this case the Appellate Court recognized that the evaluation of the testimony could best be made by the trial magistrate who was in a position to have the most comprehensive view of the whole picture before the magistrate.

The People of the State of New York, Respondent, vs. Max Berkowitz and others, Appellants, Court of Special Sessions, City of New York, Appellate Part, First Judicial Department, July 19, 1928, 132 Misc. p. 744.

This was an appeal from a judgment convicting the defendants of disorderly conduct tending to a breach of the peace—in this case the conviction was reversed, but in a dissenting opinion, Herbert J., (dissenting) on page 745 says:

"It was shown by the People and admitted by the defendants that at the hour of nine o'clock A. M. they both walked back and forth on the sidewalk in front of the Mutual Life Insurance Company located at No. 32 Nassau Street, in the Borough of Manhattan, City of New York, bearing the signs set forth in the complaint. *They accosted nobody, they were not directed to move on, and the evidence*

of having collected a crowd; even if that question be material, is not satisfactory. The sole question for our determination is: Was the conduct as above described as in the opinion of the magistrate tended to a breach of the peace. (People v. Nixon, 248 N. Y. 182.) *It is evident that the magistrate believed that it was, because he found them guilty, and it is for us to determine on this appeal whether the discretion of the magistrate in arriving at that conclusion, was properly exercised. I believe that it was.* (Italics ours.)

The acts of the defendants to constitute a violation of the statute need not go so far as to be in themselves a breach of the peace. If the acts complained of *'be at least one which reasonably tends to a breach of the peace'* (People v. Nixon, supra), *I think the statute is violated.* (Italics ours.)

The acts of the defendants in walking up and down carrying these signs at the time and place and under the circumstances mentioned did, in my opinion, tend to a breach of the peace, and a breach of the peace on this occasion might very easily have happened if the janitor of the building had not used the good judgment which he displayed in handling this situation.

The defendants' union had no grievance against the Mutual Life Insurance Company but they evidently relied upon the presence of the defendants at the time and place mentioned and upon the words on the signs reading 'Mutual Life Insurance Company' to create such a condition of affairs in front of that building as to force the Beaver Window

Cleaning Company to make terms with the union. *This conduct might easily have led to a breach of the peace and I think the magistrate had sufficient reason to decide that it would* (Italics ours.)

I vote for affirmance of the judgment of conviction."

People v. Lumbo, Westchester County Court, 8 N. Y. S. 2nd. p. 744.

This was an appeal from a conviction for disorderly conduct in violation of Sub. 11 of Section 722 of the Penal Law.

Coyne, J.

"The magistrate has found that the defendant was engaged in the illegal occupation of collecting policy slips and other memoranda used in the illegal game of policy.

The records contains ample evidence to establish the commission of the acts charged in the information and also to sustain a finding that defendant had been continuously engaged in said illegal acts over such a period of time and in such a manner as to constitute an illegal occupation. * * * *Where such findings are not clearly against the weight of the evidence they will not be disturbed on appeal.* * * * *Prosecutions under Section 722 are for criminal offenses tending toward a breach of the peace. People on Complaint of Mulhern v. Kauffman, 165 Misc. 670, 1 N. Y. S. 2nd, 362, and as to the determination and disposition of which wide discretion* is vested in the magistrate." (Italics ours.)

It is immaterial whether any breach of the peace actually occurred or whether the persons affected by the defendant's conduct were actually annoyed.

In the within case no actual breach of the peace did occur, but the situation confronting the officers was so charged with the probability of an outbreak that they made the arrest to preserve public order and to prevent an actual breach of the peace.

People v. Yergan, 164 Misc. 83, holds that it is immaterial whether any breach of the peace actually occurred or whether the persons affected by the defendants' conduct were actually annoyed.

People v. Lipschitz, 120 Misc. 633
Supreme Court, New York City.

Bijur, J., on page 635, said:

"and the essence of the offense of disorderly conduct as referred to in these statutes was *that it tended to a breach of the peace* * * * since a breach of the peace has not by the very hypothesis occurred the magistrate *could not arrive at the conclusion that the disorderly conduct complained of tends to a breach of the peace without exercising his judgment or opinion thereon and to that effect.* * * * We must not lose sight of the fact that the very offense 'breach of the peace' is one that has not been and from the very nature of the case cannot be described or confined within certain arbitrary limits and this is at least equally true of acts which tend to produce such breach." (Italics ours.)

See also: People v. Squires, 135 Misc. 214 Supra. People v. Berkwitz, 132 Misc. 744, Supra.

People (Grahl) v. Vogt, 178 Misc. 446. Magitstrates' Court, New York, Borough of Manhattan.

This case holds the defendant is guilty of disorderly conduct in violation of Subdivision 2 of Section 722 of the Penal Law where, in a public bar and grill, he addressed to the complainant, a uniformed sailor in the United States Navy, in the presence and hearing of other persons, words which would incite the complainant and others to disloyalty and public disorder. Words which ordinarily and in many places would be within the freedom of speech protected by the constitution may become a subject of prohibition when of such a nature and uttered under such circumstances as to create dangers which pertinent legislation had a right to prevent.

Rothenberg, J., page 447, said:

"A person is guilty of disorderly conduct who 'acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others.' (Penal Law, 722, subd. 2). It has, however, been held that it is not essential that there be an actual breach of the peace. The test in each case is whether the defendant's conduct under the circumstances led to, or was likely to lead to disorder or public disturbance. People v. Nesin, 179 App. Div. 869; People v. Bevins, 74 Misc. 377; affd. 149 App.

Div. 935; People v. Bellows, 281 N. Y. 67; People v. Sadowsky, 149 Misc. 583.)

The question to be determined by this court is as to whether the language used by the defendant *either created or tended to create a breach of the peace.* Freedom of speech and of the press are fundamental rights, which are safeguarded by the Federal Constitution. These rights, however, may be abused by using speech or the press so as to incite to violence or crime. The people through their authorized legislative bodies may protect themselves against the abuse of freedom of speech or of the press. *The right of free speech is not absolute. It is relative and limited by consideration of public welfare.*" (Italics ours.)

And at page 448:

"What was the tendency of the language uttered by the defendant in the case at bar? It expressed to the complainant the defendant's opposition to the war and its purposes. It incited complainant, a sailor in the United States Naval forces to insubordination and disloyalty. Defendant's words offended the complainant as well as others within hearing. The objectionable utterances were made in a public place, a bar and grill, a classic arena for brawls. *Were the complainant and the witness Ellis less restrained in their behavior upon hearing defendant's language, violence might easily have ensued under the circumstances.*

Courts may not dictate the opinions or sentiments which citizens privately may entertain, *but they may place an injunction upon the public expression*

of seditious statements in a time of war and of national danger which incite or tend to incite disloyalty and public disorder." (Italics ours.)

The reasoning in this case may well apply to the instant case, the only difference being that the possible scope of disorder, the effect of Feiner's speech on the crowd he addressed in the manner he did address them could easily have been the same as the possible effect of the defendant Vogt on the barroom crowd where he made his utterances.

People vs. Hipple, 263 N. Y. 242.

Pound, Ch. J., on page 243 said:

"A group of persons congregating on a public street may be dispursed although their intent is orderly and inoffensive. Even then it may be said that 'a breach of the peace may be occasioned.'"

People vs. Nesin, 179 A. D. 869.

This is an appeal from a judgment of the Court of Special Sessions of the City of New York.

"PER CURIAM:

Appellant opened an outdoor meeting at a crowded street corner, on May twenty-third last, by an appeal against the war, declaring to those gathered: 'You men that are listening to me, you must not obey the laws of Congress in this matter of conscription, you must not take up arms against Germany, as Germany is a friendly nation to us.' These and other words incited to resist the draft. Such

utterances upon a public street, if permitted, could hardly fail to offend law-abiding citizens, and so become dangerous to the public peace.

Appellant was rightly convicted under the Penal Law of this State, which, by Section 43, makes a misdemeanor an act 'which seriously disturbs or endangers the public peace.' That during his address of eight or ten minutes no actual disturbance broke out, did not excuse appellant, since such urging the crowd to defy the law tended clearly to provoke an outbreak. Appellant's acts may have also offended against the Federal statutes. That jurisdiction, however, did not take away the power of the courts of this State to punish such an offense against the public peace. (People v. Welch, 141 N. Y. 266.)" Jenks, P. J., Thomas, Stapleton, Mills and Putnam, JJ. concurred.

People vs. Ward, 159 Misc. 328.

"PER CURIAM: Page 330.

Police officers are guardians of the public order. Their duty is not merely to arrest offenders but to protect persons from threatened wrong and to prevent disorder. In the performance of their duties they may give reasonable directions.

Appellants further contend that defendants were merely attempting in good faith to test a police regulation. However that may be, this motive is not controlling if in fact their acts constitute disorderly conduct. In this connection the language of the court in People v. Galpern, 259 N. Y. 279, at p.

282 is pertinent: 'Failure, even though conscientious, to obey directions of a police officer not exceeding his authority, may interfere with the public order and lead to a breach of the peace."

Present—Kernochan, P. J., Bayes and Brady, J. J.

People vs. Nixon, 248 N. Y. 182.

Lehman, J., on page 188 said:

"*Police officers are guardians of the public order. Their duty is not merely to arrest offenders but to protect persons from threatened wrong and to prevent disorder. In the performance of their duties they may give reasonable directions. Present at the point where the defendant were congregated they might clearly sense the possibility of disorder.* Even a protest from pedestrians who were annoyed by the defendants' conduct might be a significant element in determining whether persistence in such conduct was wrongful. Enough has been shown in these cases to justify the officers in warning the defendants. Refusal to heed the warning so given; persistence in parading the street in groups thereafter, is, perhaps so significant of a contumacious disregard of the rights of others that it supports the finding of guilt of the defendants. In these cases the judgments must be affirmed." (Italics ours.)

People on complaints of Whalen vs. Friedman, 14 N. Y. S. 2nd Series 389, City Magistrates Court, Eighth District, Borough of Brooklyn August 25, 1939.

DeAndrea, City Magistrate, page 392 said:

"Reasonable discretion must in such matters be left to the police, and only when they abuse or exceed that discretion do they transcend their authority and depart from their duty. Failure even though conscientious to obey direction of a police officer often may interfere with the public order and lead to a breach of the peace. *It is not necessary nor does the law contemplate that the police must wait until a breach of the peace has actually occurred before they act. It is their duty to prevent such a breach since they are the guardians of the public order. At the scene of the congregation they might easily anticipate or sense the possibility of disorder.*" (Italics ours.)

Citing—People vs. Nixon, 248 N. Y. 182; People v. Galpern, 259 N. Y. 279.

Judge DeAndrea further says, page 393:

"The mere fact that a group gathered on the streets is peaceful in its aims and innocuous in its manner does not ipso facto eliminate it from a possible application of Section 722 of the Penal Law. A group of persons congregating on a public street may be dispersed although their intent is orderly and inoffensive. Even then it may be said that a breach of the peace may be occasioned." Citing People v. Galpern, 259 N. Y. 279.

Even though the testimony adduced at the instant trial shows that the milling, pushing and shoving had not resulted in any outbreak and there was no actual breach of the peace, yet there was a then present probability of a breach of the peace, there was sufficient evidence to warrant their action and uphold the conviction in that the defendant insisted on speaking after he was warned to cease by the police officer making a breach more probable.

People v. Galpern, 259 N. Y. 279.

Lehman J., on page 261 said:

> "The duty of police officers, it is true, is 'not merely to arrest offenders but to protect persons from threatened wrong and to prevent disorder.' In the performance of their duties they may give reasonable directions."

Lehman, J., on page 282 further said:

> "*Reasonable discretion must, in such matters, be left to them, and only when they exceed that discretion do they transcend their authority and depart from their duty.* The assertion of the rights of the individual upon trivial occasions and in doubtful cases may be ill-advised and inopportune. Failure, even though conscientious, to obey directions of a police officer, not exceeding his authority, may interfere with the public order and lead to a breach of the peace." (Italics ours.)

Lehman, J., on page 284 further said:

> "*Even if we should find that the police officer's interference was unnecessary and in the circum-*

stances ill-advised, we could not find that it was unauthorized. The defendant, knowing the character and standing of his group of friends and that they would not willingly annoy or offend others; might conclude that the interference was officious; the police officer without such knowledge might conclude that it was a useful precaution to avoid possible disturbance. *The law authorized the officer to use his judgment.* Friends may congregate on the sidewalk in an orderly group for a short conversation without creating disorder or unduly offending or obstructing others, *but they must 'move on' when a police officer so directs for the purpose of avoiding disorder which otherwise might ensue.* The Legislature has provided that failure to obey such direction in itself is disorderly conduct. That provision tends to preserve public order on the streets of a great city. A refusal to obey such an order can be justified only where the circumstances show conclusively that the police officer's direction was purely arbitrary and was not calculated in any way to promote the public order. That is not the case here. *The Courts cannot weigh opposing considerations as to the wisdom of the police officer's directions when a police officer is called upon to decide whether the time has come in which some directions are called for.*" (Italics ours.)

Whitney vs. California, 274 U. S. 357.

Mr. Justice Sanford said on page 371:

"That the freedom of speech which is secured by

the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose or an unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom; and that a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question." Gitlow vs. New York, 268 U. S. 562, 666-668, and cases cited.

Cantwell vs. Connecticut, 310 U. S. 296.

Mr. Justice Roberts said on page 308:

"The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty cannotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets or other immediate threat to public safety, peace or order appears, the power of the State to prevent or punish is obvious."

People v. Hussock, 23 N. Y. S. 2nd 520.

Page 521:

"1. BREACH OF THE PEACE.

A complaint charging that a defendant committed offense of disorderly conduct need not specify the particular subdivision of disorderly conduct statute alleged to have been violated, it being sufficient if the defendant is convicted of the violation of any subdivision of the statute. Penal Law Sec. 722.

Page 522:

2. Where complaint charged that defendant committed offense of disorderly conduct, in violation of subdivision 2 of disorderly conduct statute because he caused a crowd to collect and refused to move on when ordered by policemen, defendant found guilty of refusing to move on when ordered so to do by a policeman was properly convicted although the facts showed a violation of subdivision 3 of the statute, since failure to specify that defendant's conduct constituted a violation of subdivision 3 was immaterial. Penal Law, Sec. 722, subds. 2, 3.

Page 523:

PER CURIAM.

It is clear from the record that although the complaint specifically charged a violation of Subdivision 2 of the said Section 722, the Court found defendant guilty of refusing to move on when ordered so to do by the policeman. In other words, the conviction was based upon a violation of Subdivision 3 of said Section 722 pursuant to which a person may

be adjudged guilty of disorderly conduct who 'congregates with others on a public street and refused to move on when order by the police.' It has been held that under said Section 722, it is not necessary to specify in the complaint the particular Subdivision alleged to have been violated. See People v. Hipple, 263 N. Y. 242, 188 N. E. 725. It is sufficient if the defendant be convicted of the violation of any Subdivision of said Section. In the present case defendant was charged with refusing to move on when ordered so to do and the failure to specify that this constituted a violation of Subdivision 3 of said Section is immaterial. A great deal of appellant's brief is taken up with the contention that said Section 722 as applied by the Court below is unconstitutional in that it deprives defendant of his liberty of assembly, freedom of speech and of the press and of his liberty to worship according to the dictates of his conscience. Appellant further contends that Subdivision 3 of Section 722 of the Penal Law is invalid for the reason that it vests arbitrary and discriminatory power in the police, thereby leaving the question of a violation to the whim of the police. It must be said, however, that most rights under the law are relative and must be exercised with reference to the public weal. From a reading of the record we are of the opinion that defendant was properly convicted of a violation of Section 722, Subdivision 3 of the Penal Law, and that the judgment should be affirmed."

People vs. McWilliams, 22 N. Y. S. 2nd, 571.

This was a hearing, instituted upon a summons charging the defendant with disorderly conduct in violation of Section 722, Subdivisions 1 and 2 of the Penal Law.

Bromberger, City Magistrate on page 574, said:

> "The test in each case is whether the defendant's conduct *under all the circumstances is likely to lead to disorder or public disturbance.* It will be seen that, in applying this test, the courts have necessarily passed judgment upon the competing social interest that would be served by the defendant's freedom of action and those served by penalizing his conduct and utterances as objectionable." (Itlaics ours.)

Quoting from Hague vs. C. I. O., 307 U. S. 496, Judge Bromberger says at page 575:

> "In that case, however, the court specifically said that this right 'may be regulated in the interest of all; it is not absolute, but relative and must be exercised in subordination to the general comfort and convenience and in consonance with peace and good order' * * * 'As in the case of all 'relative' rights, *the point at which conduct in the course of a meeting becomes unlawful must be ascertained by the words employed, the intent of the speaker, the reaction of those there assembled* and to some extent where necessary, *by balancing conflicting social ideas. Against the public interests in freedom of discussion it is necessary to weigh 'general comfort*

and convenience' and the 'peace and good order' of the community." (Italics ours.)

And speaking of Hague vs. C. I. O., Bromberger, City Magistrate, said:

> "The opinion thus recognizes *not only the power of the State to punish abuses of right, but its duty to maintain order in connection with street meetings. The duty is discharged in this State by the enforcement of Section 722 of the Penal Law.*" * * * (Italics ours.)

Quoting further, Bromberger, City Magistrate, says at page 577:

> "In determining the law, there is no need here to consider the question whether there are ever any circumstances under which innocent public gatherings should be penalized solely because the views represented and expressed are offensive to certain groups in the community. Where meetings confined to orderly addressed advocating legislative changes, that question might be relevant. When their inflammatory character results from villifying attacks that far exceed any reasonable bounds of orderly public discussion; *when these attacks are accompanied by evidences of disorder in the group in the meeting thus addressed, or when disorder is threatened not only because of abuse directed at the opposition but also by incitement of the speaker's followers to disorder, the right of public assembly is abused.* The Dunn case establishes beyond question that such abuse of the right constitutes disorderly conduct." (Italics ours.)

In this case the motion to dismiss was denied, a formal complaint was drawn and the defendant was found guilty and paroled for investigation and sentence. He was committed to Bellevue Hospital for observation, pronounced sane and later sentence to the workhouse.

There has been no violation of the constitutional rights of the defendant nor does his conviction violate either the fourteenth or the first amendment of the Federal constitution.

The section of the Penal Law of the State of New York, Section 722, Subdivision 2, is not a law abridging the freedom of speech, the freedom of the press or the right of peaceful public assembly. This section has been construed by our courts (People vs. Pieri, 269 N. Y. 315; People vs. Arcidiaco, 156 Misc. 461; People vs. Berman, 156 Misc. 463). The People recognizes these rights as fundamental rights, rights to be protected and not abused and no argument against such fundamental rights could even be entertained. The People contend that were these rights to be regarded as absolute, as does counsel for the defendant, wherein liberty and privilege are transformed to license. The liberty and freedom which we cherish would be transformed into uncontrollable confusion. The People agree with all that counsel for the defendant says in reference to freedom of speech being a cherished policy of our civilization and further contend that this freedom rather than its abuse is the thing most to be cherished.

There is nothing in this case as tried and decided that even remotely approaches the "suppression of ideas" the

"coercement of sentiment"; "the public guardionship of the public mind" or the thwarting of the "dissemination of views". It was not for the full free expression of the speaker's mind, intemperate though it was, that he was convicted, but because rather, that what he said and did, under all the circumstances had the effect on the assembled crowd to tend to a breach of the peace.

Here there was no previous restraint. The officers present for twenty and thirty minutes respectfully listened and observed. There was no attempt on their part to deny the use of the street for the meeting. There was no abridgment of the right of freedom of assembly. The crowd was assembled and allowed to continue in assembly until the reaction of the crowd to the words of the speaker threatened a breach of the peace. These officers patiently listened to the speaker berate individuals, organizations and the municipal administration, yet they calmly waited. He was allowed to vent his intemperate views without interruption. Surely here there was no denial to him of his right of freedom of speech, for he spoke for half an hour and could have continued indefinitely had not the tenor of his urgings had the effect on the crowd to cause it to become unruly to the point where the police were questioned as to their ability to handle the situation. These police had a picture of a situation that was fast heading toward an outbreak and who can say that they should have acted otherwise than they did. Counsel in his petition states that but two minutes elapsed from the time request was made of Feiner to terminate his speech and his being taken down from the box. The record says, insofar as the testimony of Officer Cook, page 64, is concerned, that Officer Cook's answer to have been "Maybe four or five minutes", during which

time Feiner continued in defiance of Officer Flynn's request. Much could happen in four or five or even two minutes in a surging crowd.

The petitioner had his freedom of speech and of assembly without any previous restraint or interruption, he used it, and then abused it. The abuse resulted in his violation of a state statute many times construed as to its constitutionality by the Court of Appeals of the State of New York. His abuse of the privileges, that were never denied him, resulted in the offense for which he was convicted. It is stretching constitutional privilege and guarantees to a point inconceivable, to claim this privilege as a defense to an offense against the dignity of the State.

The People recognize and subscribe to all that our courts, both State and Federal, have enunciated as to the constitutional guarantees of freedom of speech and freedom of assembly, as the cornerstone of democracy but are just as firmly impressed that certain curbs on such freedoms are essential to the preservation of this democracy. The proper checks are equally essential to the privileges.

Counsel's argument that the within "conviction makes speech and assembly subject to abridgment and penalty. It subjects speech and assembly to censorship by a police officer whenever, in his personal judgment what is being said or the purpose of the assembly is objectionable to him" is wholly without merit and in no way substantiated by anything in the record. There is no evidence in this record as to what the personal view of either officer was or that he or they had any personal reaction to the speech. The record does show that they interrupted the meeting to prevent actual disorder. They might even have agreed

with the speaker and yet as police officers performed their duty to preserve order. The further statement of counsel for the petitioner that "The essence of this case is that a public meeting, called by a group of citizens to discuss a public issue was broken up and a speaker arrested because the police officers or some onlookers disapproved of the meeting or the speech" is equally untrue and a very unworthy attempt to misstate facts to the court. Counsel is attempting to minimize the abuse of the freedom by the petitioner, and to blame the peace officers for the petitioner's intemperance, resulting as it did in a threatened breach of the peace. The falacy of counsel's reasoning is his unwillingness to concede that there ever could be any limitation placed on freedom of speech or assembly and reasons as if to contend that regardless of disorder or threatened disorder a speaker is never subject to restraint so long as these freedoms are guaranteed. These police officers didn't make any arrest because of unrest in the crowd or because the speech inspired anger or resentment but only when this unrest, resentment and anger grew from a passive state of mental resentment into a positive phyical state of threatened and impending disorder.

There was no coerced conformity or limitation of freedom of discussion. There was no attempt by police officers or listeners or both, who disapproved of the subject matter of a meeting to deny the constitutional right of the speaker to speak and his listeners to hear his views. There is no evidence in the record of this case that the police entertained any opinions as to the subject matter of petitioner's speech or that their action was based on such opinion. No one was kept from joining, or remaining in the crowd. The subject matter was absolutely immate-

rial. As the trial judge, in substance said, the petitioner had a perfect right to be rude and speak intemperately. The police were not acting as censors of a speech. They were, however, guardians of public order and there is no evidence that they acted other than in that capacity. They did not make an arrest because of any disagreement with the speaker's views but because he was guilty of disorderly conduct in bringing about a condition where a breach of the peace was threatened and refusing to discontinue when properly requested to do so. Certainly here was a clear and present danger that justified police action. They could choose between allowing the speaker to continue with disorder attending, and preserving order by causing the speaker to desist.

The courts both State and Federal while upholding the rights of freedom of speech, of assembly and of the press have always recognized the necessity of proper curbs on these freedoms.

It is unthinkable that our courts would do other than to apply checks and balances in deciding cases wherein freedom of speech, press and assembly are made the issue in a defense to other charges made, and it is well recognized that nowhere, either in State or Federal Courts have these freedoms been recognized as absolute. The evil consequences of the abuse of those privileges have been so numerous that, for the protection of these very rights, the courts championing them have placed a standard beyond which one in their enjoyment may not go. .. long line of cases hold that the rights guaranteed by the First and Fourteenth Amendments are subordinate to the greater rights of the general public interest, and to the right of the

government to maintain and protect itself, and subject to reasonable restriction when necessary to safeguard that public interest.

A synopsis of the holdings in the following cases substantiates this contention.

People v. Gitlow, 266 U. S. 652, pp. 666-670.

This case was before the Supreme Court on a Writ of Error to the Supreme Court to which the record was remitted. The contention was that the statute by its terms and as applied was repugnant to the due process clause of the Fourteenth Amendment.

On page 666, Mr. Justice Sanford says:

> "It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse freedom" * * *

On page 667, Justice Sanford further says:

> "That a state in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime or disturb the public peace is not open to question."

Citing:

Robertson vs. Baldwin, 165 U. S. 275, 281.

Patterson vs. Colorado, 205 U. S. 454, 462.

Fox vs. Washington, 236 U. S. 273, 276.

Gilbert vs. Minnesota, 254 U. S. 325, 332.

Warren vs. United States (C. C. A.), 183 Fed. 718, 721.

People vs. Most, 171 N. Y. 423, 431.

State vs. Holm, 139 Minn. 267, 275.

State vs. Hennesy, 114 Wash. 351, 359.

State vs. Boyd, 86 N. J. L. 75, 79.

State vs. McKee, 73 Conn. 18, 27.

Further on page 668, he says:

"Every presumption is to be indulged in favor of the Statute * * * and the case is to be considered in the light of the principle that the State is primarily the judge of the regulations required in the interest of public safety and welfare."

And on page 669, he says:

"It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbance of

the public peace or imminent and immediate danger of its own destruction; but it may in the exercise of its judgment suppress the threatened danger in its incipiency."

Again on page 670, he says:

"When the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involved such danger of substanstive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substanstive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition."

The reasoning here is most applicable to the within case for the facts clearly show that a breach of the peace might easily have been occasioned.

Bridges Hardware Co. v. Horowitz,
93 N. Y. S. 2nd 323.

"The rights of free speech, right to strike, and right to persuade and gain sypathizers with, and converts to, the cause of unionism does not include or give the right to employees on strike to abuse or intimidate and insult, employers, strike breakers, and customers."

Walter, J. on page 328 says:

"Such picketing is neither peaceful nor lawful. Neither the right of free speech, nor the right to

strike, nor the right to persuade and gain sympathizers with, and converts to the cause of unionism includes or gives the right to abuse or intimidate or insult employers, strike breakers or customers and such acts may and should be enjoined."

United States v. Foster, 9 F. R. D. 367.

Constitutional rights of freedom of speech and of the press are not denied by conviction for violation of a statute making it unlawful to advocate or organize any group of persons who advocate the overthrow or destruction of the government by force or violence or to conspire to do so.

Medina, District Judge, on page 390 says:

"But no one could suppose nor is it the law that any person has an absolute and unbridled right to say or to write and to publish whatever he chooses under any and all circumstances. If he did have such a right and if such were the law, the words 'We, The People of the United States, in order to form a more perfect union, establish justice, *insure domestic tranquility*, provide for the common defense, *promote the general welfare* and secure the Blessings of Liberty to ourselves and our posterity, do ordain and establish this Constitution of the United States of America' as contained in the Preamble to the Constitution, would be no more than empty phrases. Doubtless you observed that I placed emphasis on the 'insure domestic tranquility' and 'promote the general welfare' clauses of the

preamble. Words may be the instruments by which crimes are committed as in many familiar situations; and it has always been recognized that the protection of other interests of society may justify reasonable restrictions upon speech in furtherance of the general welfare." (Italics ours.)

Marshall v. United States, 176 Federal
Reporter 2d, 473, 474.
United States Court of Appeals
District of Columbia Court.

In this case the appellant attacked the constitutionality of the resolution creating the committee on Unamerican Activities on the ground that it abridged freedom of speech and press guaranteed by the First Amendment to the Constitution. The court held the contention to be without merit and holding that the rights guaranteed by the First Amendment are not absolute and are subordinate to the greater rights of the general public interest, and the right of the government to maintain and protect itself.

Sweeney, District Judge, sitting in Circuit Court by designation, says on page 474:

"The claim that the Resolution is unconstitutional in its application to the facts of the case because it abridges freedom of speech and press guaranteed by the First Amendment to the Constitution is without merit. The rights guaranteed by the First Amendment are not absolute and are subordinate to

the greater rights of the general public interest, and to the right of the government to maintain and protect itself."

American Communications Association C. I. O. et. al. vs. Douds United Steel Workers of America, et al. vs. National Labor Relations Board 70 Supreme Court Reporter 674 pp. 683 685.

In his opinion in the foregoing cases, on page 683, Mr. Chief Justice Vinson says:

"When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the Nation is an absurdity."

And on page 684:

"On the contrary, however, the rights of the public to be protected from evils of conduct, even though First Amendment rights of persons or groups are thereby in some manner infringed has received frequent and consistent recognition by the Court." * * *

As Chief Justice Hughes put it:

"Civil liberties as guaranteed by the Constitution imply the existence of an organized society, maintaining public order without which, liberty itself would be lost in the excess of unrestrained abuses."

And on page 685:

"The deference due legislative determination of the need for restriction upon particular forms of conduct has found repeated expression in this Court's opinions."

U. S. v. Painters Local Union #481,
79 Fed. Supp. 516.
District Court, District of Connecticut.

In speaking of the first amendment held that, Rights protected by his amendment, forbidding laws impairing freedom of religion, speech or press or right of people peaceably to assemble and petition, are subject to reasonable restrictions when necessary to safeguard public interest.

Hincks, District Judge, on page 522 says:

"At first glance, at least, it would not seem that an act which goes no further than to regulate aggressions both of capital and of labor in their expenditures could be deemed, as the defendants contend, an unlawful abridgment of the rights of free speech, press and assembly. But even if the Act does result in some incidental restrictions of rights protected by the First Amendment, it does not necessarily follow that an unlawful abridgment has resulted. For the rights protected by the First Amendment are not absolute; it is well established that they are subject to reasonable restrictions when necessary to safeguard the public interest."

U. S. v. Korner, 56 Fed. Supp. 242
District Court, S. D. California.

The liberties protected by this amendment are not absolute liberties but are subject to a restraint tolerated under the clear and present danger rule.

Hall, District Judge, on page 247 says:

"The next proposition is to determine the extent of the liberties of the First Amendment. In that connection it must be regarded as also settled that the liberties of the First Amendment are not absolute liberties but are subject to a limited restraint. But such restraint is tolerated by our Constitution only under what has now come to be known as the 'clear and present danger' rule."

Kiyaski Okamoto vs. United States,
152 F. 2d 905
Circuit Court of Appeals, Tenth Circuit.

The constitutional rights of freedom of speech, freedom of press and freedom of assembly though fundamental are not absolute.

Bratton, Circuit Judge, on page 907 says:

"Freedom of speech, freedom of the press and freedom of assembly guaranteed by the First Amendment are fundamental rights, but though fundamental they are not in their nature absolute. These rights are not unbridled license to speak, publish or assemble without any responsibility what-

ever. Their exercise is subject to reasonable restriction required in order to protect the Government from destruction or serious injury. The delicate and difficult question usually presented is whether speech, press or assembly are of such a nature as would produce or are calculated to produce a clear, present and imminent danger of a substantive evil which Congress has the Constitutional power to prevent."

National Labor Relations Board v. M. E. Blatt Co., 143 F. 2d 268 Circuit Court of Appeals, Third Circuit.

The constitutional guaranty of freedom of speech does not guarantee him who speaks immunity from the legal consequences of his verbal actions.

Biggs, Circuit Judge, on page 274, says:

"The guaranty of freedom of speech contained in the First Amendment does not guarantee him who speaks immunity from the legal consequences of his verbal actions."

In re Porterfield, 168 P. 2d 706; 28 Cal. 2d 91; 167 A. L. R. 675.

The right of free speech protected by this amendment (First) and the Fourteenth Amendment Constitution of California Article 1, Sections 1, 3, 9, 13, is not an absolute right which carries with it into business and profressional total immunity from

regulation in the performance of acts to which speech is a mere incident.

Schauer, Justice, on page 713, says:

"A municipality may impose reasonable conditions upon the conduct of business. The right of free speech protected by the federal and state constitutional guarantees is not an absolute right which carries with it into business and professions total immunity from regulation in the performance of acts as to which speech is a mere incident. It was not intended that a right to speak for the purpose of profit may be created to the derogation of the police power of state or city. *The main purpose of such constitutional provisions was to prevent previous restraint* of (as had been imposed by other governments and in earlier times in this country) or the stifling of efforts pointing toward enlightment of individuals upon or concerning their rights and beliefs and the duty of their rulers."

And on page 714 he says:

"It has often been said that it is only when it clearly appears that an ordinance or statute passes definitely beyond the limits which bound the police power and infringes upon rights secured by the fundamental law, that it should be declared void."

Hill v. State ex rel Watson, 19 S. O. 2d 857; 155 Fla. 245 Supreme Court of Florida.

The guarantees of freedom of speech, free press,

and free assembly are not absolute but are subject to reasonable police regulations in the interest of the public.

Tenell, Justice, on page 859, says:

"Appellants contend that these regulations unduly restrict their freedom of speech and free assembly. This contention overlooks the fact that none of these guarantees are absolute but are subject to reasonable police regulations in the interest of the public."

And on page 861 he says:

"The sole test for the exercise of the police power is reasonableness. True the Legislature cannot under the guise of the police power arbitrarily invade personal or property rights or interfere with private business, but if the statute has some rational relation to the safety, health and morals or general welfare and the means employed may be reasonably said to accomplish the desired purpose, it is within the scope of the police power. The means adopted by the act must be reasonably necessary. They must be reasonable in their effect on the person, must not be oppressive and must not be designed to the annoyance of any particular person or class."

And on page 862 he says:

"The purpose of the regulation is not punic but to preserve the democratic process and bring to the knowledge of the individual or group regulated that it has *an obligation to the public that rises above its personal or group interest.*" (Italics ours.)

Stanton v. Board of Education,
City of New York, 76 N. Y. S. 2d 559.
Supreme Court, Special Term,
Kings County—Part I.

A person may believe in and proclaim a doctrine with which others may not agree, but he may not abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, *disturb the public peace*, endanger the foundations of organized constitutional government or threaten its overthrow by force. (Italics ours.)

Froessel, Justice, on page 561, says:

"On the other hand it must be recognized that this right under our Constitutions is not without its limitations. Absolute freedom includes the right to impose one's will upon another even to the point of enslavement. No one can contend for such freedom under our Constitutions. The rights of speech and assembly are subject to the rights of others as well as of the state. As was said in Gitlow v. New York, 268 U. S. 652, 45 S. Ct. 625, 69 L. Ed. 1138, 'It is a fundamental principle long established, that the freedom of speech and of the press which is secured by Congress, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. (Citing cases). Reasonably limited, it was said by Story in the passage cited this freedom is an inestimable privilege in a free

government, *without such limitations it might become the scourge of the republic.* * * * A state may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means * * *. In short, this freedom does not deprive of the primary and essential right of self preservation; which so long as human governments endure, they cannot be denied." (Italics ours.)

And on page 564 he said:

"As I indicated upon the argument, the law is well established that courts will not interfere with the exercise of discretion entrusted by law to public officers or bodies unless it be clearly demonstrated that the act complained of voilates a specific statute or is essentially arbitrary.

Bowe vs. Secretary of The Comm.,
69 N. E. 2d 115,
Supreme Judicial Court of Massachusette, Suffolk.

Freedom of the press, of speech, and of assembly are subject to reasonable regulations in interest of the public, but complete freedom remains the rule unless and until regulated or restricted on rational grounds relating to the public welfare.

Lummus, Justice, on page 129, says:

"It is true that the three freedoms under discussion are not absolute. Constitutional freedom means liberty regulated by law. * * * Liberty is immunity

from arbitrary commands and capricious prohibitions but not the absence of reasonable rules for the protection of the community. * * * All three freedoms under discussion are subject to reasonable regulations in the interest of the public. * * *

But complete freedom remains the rule, unless and until regulated or restricted on rational grounds relating to the public welfare."

Slater v. Salt Lake City
206 P. 2d 153
Supreme Court of Utah.

The constitutional right of free speech is subject to reasonable regulations.

Latimer, Justice, on page 157, says:

"Mr. Justice Reed places the constitutional right of freedom of speech in a preferred position, or on a higher plane than other rights, while Mr. Justice Frankfurter takes a contrary view. However, both agree that regardless of its position, the right is subject to reasonable regulations.

Of course, even the fundamental rights of the Bill of Rights are not absolute * * * the hours and place of discussion can be controlled. * * *

The most stringent protection of free speech would not protect a man falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effects of force. * * *

The right to speak one's mind would often be an empty privilege in a place and at a time beyond the

protecting hand of the guardians of public order. * * * The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience."

Emden v. Vitz, 198 P. 2d 696
District Court of Appeals, Second District Division 3, California.

The constitutional right of freedom of speech is not a license for commission of crime or the malicious oppression of one fellow citizens.

Shinn, Presiding Justice, on page 700, says:

"Appellants also claim that the judgment infringes upon their constitutional right of freedom of speech. We mention the point only to remark that the right is not a license for the commission of crime or the malicious oppression of one's fellow citizens. A decent respect for the rights of free speech requires that it be protected against abuse."

Kovcas v. Cooper, 50 A. 2d 451
Supreme Court of New Jersey.

The freedom of speech and assembly as preserved by state and federal constitutions are not absolute but may be curtailed under a reasonable exercise of the police power where the public health, safety and general welfare of a community demand.

Wachenfeld, Justice, on page 452, says:

"While the freedom of speech and assembly are

enunciated and preserved by the New Jersey and United States Constitutions, these freedoms are not absolute but may be curtailed under a reasonable exercise of the police power where the public health, safety and general welfare of the municipality demand. * * * Civil liberties as guaranteed by the Constitution imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excess of unrestricted abuses."

Krasner v. State, 26 So. 2d 519
Court of Appeals of Alabama.

The freedom of speech and of the press does not confer an absolute right to speak or publish, without responsibility whatever one may choose or an unrestricted or unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.

Harwood, J., on page 523, says:

"These rights and privileges are not absolute. They do not confer a right of licentious action. The freedom of the press and of speech, which Congress, by the First Amendment to the Federal Constitution is prohibited from abridging says: 'That this amendment was intended to secure to every citizen an absolute right to speak, or write, or print whatever he might please without any responsibility public or private, therefore is a supposition too wild to be induged by rational man * * * It is plain, then, that the language of this amendment imports no

more than that every man shall have a right to speak, write and print his opinions upon any subject, without prior restraint, so always that he does not injure any other person in his rights, person, property or reputation and so always that he does not thereby disturb the public peace or attempt to subvert the government'. Story on the Constitution 5th Ed. 634, 635.

It is a fundamental principle, long established that the freedom of speech and of the press which is secured by the Constitution does not confer an absolute right to speak or publish, without responsibility whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom."

Alabama State Federation of Labor
v. McAdory, 18 So. 2d 810; 246 Ala. 1
Supreme Court of Alabama.

The State under its police power may enact laws which interfere indirectly and to a limited extent with the right of speech or liberty of people if reasonably necessary for protection of general public.

Gardner, Chief Justice, on page 822, says:

"and as observed in Carpenters and Joiners Union v. Ritters Cafe, supra.

Where, as here, claims on behalf of free speech are met with claims on behalf of the authority of the state to impose reasonable regulations for the protection of the community as a whole. The duty

of this court is plain. Whenever state action is challenged as a denial of 'liberty' the question always is whether the state has violated the essential attributes of that 'liberty' * * * while the right of free speech is embodied in the liberty safeguarded by the Due Process Clause, that clause postulates the authority of the states to translate into law local policies to promote the health, safety, morals and general welfare of the people."

Meadowbrook Dairies v. Milk Wagon Drivers Union of Chicago, 21 N. E. 2d 308
Supreme Court of Illinois.

The privilege of free speech cannot be used to the exclusion of other constitutional rights nor as an excuse for unlawful activities.

Gunn, Justice, on page 816, says:

"The right to acquire and protect property is an inherent right not given but declared by the Constitution. The privilege of free speech cannot be used to the exclusion of other constitutional rights, nor as an excuse for unlawful activities."

State v. Cox, 16 A. 2d 508 Supreme Court of New Hampshire.

An ordered freedom is all that is secured by the guaranty of freedom to worship, freedom of speech and freedom of the press.

Allen, Chief Justice, on page 512, says:

"The right of speech is an incident of the right of highway travel but the right of highway travel is not inherent in the right of speech."

And on page 515, he says:

"An ordered freedom is all that the guaranty of individual rights secures. Maintenance of order neither abridge or denies freedom."

People v. Winters, 48 N. Y. S. 2d 230.

Freedom of speech and press guaranteed by state constitution does not imply complete exception from responsibility for everything a citzen may say or publish.

Cohn, Justice, on page 232, says:

"The freedom of speech and of the press which is secured by such a constitutition guaranty does not imply complete exemption from responsibility for everything a citizen may say or publish. Indeed the state Bill of Rights expressly provides that a person exercising the freedom is responsible for the abuse of the right.

Pursuant to the police power and without abridging freedom of the press the state may enact reasonable regulations to protect the general welfare, public safety and order, and public morals."

People v. Richards, 31 N. Y. S. 2nd 457, District Court of New York, Nassau County.

The rights of assembly and free speech are relative and may be regulated in the interests of all, and must be exercised in subordination to the general comfort and convenience and in consonance with peace and good order.

Greason, J., on page 461, says:

"Nothing indicates that the State Park Commission by its ordinances has attempted to tamper with the rights of assembly and free speech—it being remembered that these rights are not absolute, but relative—that these rights may be regulated in the interest of all and must be exercised in subordination to the general comfort and convenience and in consance with peace and good order."

Chaplinsky v. New Hampshire, 315 U. S. 568.

Mr. Justice Jackson, in his opinion, on page 571 said:

"Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well defined and narrowly limited classes of speech the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous and the insulting

or fighting words, those *which by their very utterance inflict injury or tend to incite an immediate breach of the peace.*" (Italics ours.)

And on page 572 he further said:

"It has been well observed that such utterances are no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Resort to epithets or personal abuse is not in any proper sence communication of opinion safeguarded by the constitution and its punishment as a criminal act would raise no question under that instrument.

We are unable to say that the limited scope of the statute thus construed contravenes the constitutional right of free expression. It is a statute narrowly drawn and limited to define, and punish specific conduct lying within the domain of state power, *the use in a public place of words likely to cause a breach of the peace.*" (Italics ours.)

Shively v. Garage Employees Local Union #44, 108 P. 2d 354
Supreme Court, Washington.

The right of the freedom of speech guaranteed by the Federal Constitution is not an absolute right which may be exercised without any qualifications, but like other rights must be exercised with reasonable regard for the conflicting rights of others.

Jeffers, J., on page 357, said:

"We are therefore now confronted with the question of whether the constitutional guaranty of freedom of speech is an absolute right, which may be exercised without any qualifications, or whether, like other rights, it must be exercised with reasonable regard for the conflicting rights of others.

We are of the opinion the right of freedom of speech is not absolute."

And on page 358 he further said

"The Fourteenth Amendment cannot be invoked as a mantle of protection under which the wrong doer can plead immunity from the judicial processes of our courts."

Taylor v. State, 11 So. 2d. 663
Supreme Court, Mississippi.

The constitutional right of free speech does not mean the unbridled license of speech, and the abuse of the right may be punished under the police power.

Roberts, J., on page 667, said:

"Even in peace time the right of free speech does not mean unbridled license of speech. The right may be abused, for which abuse punishment may be meted out under the police power of the State. The Constitution protects the right but not the abuse. For instance, one has no right, even in times of peace to use language, oral or written, which wrongfully injures another in person or prop-

erty, or tends to corrupt public morals, induce crime, endanger the public safety * * *"

State v. O'Donnell, 200 A. 739
Supreme Court, New Jersey.

The Disorderly Persons Act (N. J.) is a valid exercise of the police power and not an abridgment of the right of free speech.

Donges, J., on page 740, said:

"The argument is that the act was designed to prevent street brawls and disorder, and that a statement made in the course of a speech to a street meeting lawfully held does not constitute disorderly conduct. The difficulty is that the section under consideration defines as a disorderly person any person who shall 'indulge in and utter loud or offensive or indecent language'. The complaint is in the language of the statute and is therefore good."

And on page 741 he further said:

"There is nothing in the statute which abridges the right of free speech. It says that loud and offensive talk is disorderly. Defendant might have said anything he wished, and if he had not said it loudly or if it had not been offensive there would have been no violation of the statute. The act is clearly a valid exercise of the police power."

State v. Klaprott, 22 A. 877
Supreme Court of New Jersey.

Statutes regulating freedom of speech, or free-

dom of the press, are upheld if they are directed at abuses which menace the state itself, such as utterances inimical to public welfare or tending to corrupt public morals, incite to crime or disturb public peace.

Brogan, J., on page 880, said:

"Statutes that regulate speech, or of the free press that have been upheld as not in conflict with our fundamental law are those directed at abuses, which menace the State itself."

Whitney v. California, 274 U. S. 357.

Right of free speech is not absolute right to speak without responsibility, and under police power State may punish utterances inimical to public welfare.

Mr. Justice Sanford, on page 371, said:

"That the freedom of speech which is secured by the Constitution does not confer an absolute right to speek, without responsibility, whatever one may choose or an unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom; and that a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace or endanger the foundations of organized government and threaten its overthrow by unlawful means,

is not open to question." *Gitlow vs. New York*, 268 *U. S.* 562, 666-668, *and cases cited.*

Robertson v. Baldwin, 165 U. S. 275, 281.

Mr. Justice Brown, on page 281, said:

"The law is well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights were not intended to lay down any novel principles of government, but simply to embody certain guarantees and immunities which we had inherited from our English ancestors, and which from time immemorial had been subject to certain well recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus the freedom of speech and of the press (Art. 1) does not permit the publication of libels, blasphemous or indecent articles, or other publication injurious to public morals or private reputation; * * *"

Paterson v. Colorado, 205 U. S. 454, 462.

Mr. Justice Holmes, on page 462, said:

"* * * But even if we were to assume that freedom of speech and freedom of the press were protected from abridgment on the part not only of the United States but also of the States, still we should

be far from the conclusion that the plaintiff in error would have us reach. In the first place, the main purpose of such constitutional provisions is 'to prevent all such *previous restraints* of publications as had been practiced by other governments' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare (Commonwealth v. Blanding, 3 Pick 304, 313, 314; Respubica v. Oswald, 1 Dallas 319, 325). The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart from the statute in most cases if not in all. (Commonwealth v. Blanding ubi sup 4, Bl Comm 150)" (Italics ours.)

Gilbert v. Minnesota, 254 U. S. 325, 332.

On pages 332 and 333, Mr. Justice McKenna, said:

"The next contention is, that the statute is violative of the right of free speech, and therefore void. It is asserted that the right of free speech is a natural and inherent right, and that it, and the freedom of the press, were 'regarded as among the most sacred and vital possessed by mankind, when this nation was born, when its constitution was framed and adopted.' And the contention seems necessary for the plaintiff in error to support. But without so deciding or considering the freedom asserted as guaranteed or secured either by the Constitution of the United States or by the constitution

of the State, we pass immediately to the contention and for the purposes of this case may concede it, that is, concede that the asserted freedom is natural and inherent, but it is not absolute, it is subject to restriction and limitation. And this we have decided. In Schenck v. United States, 249 U. S. 47, 52, we distinguished times and occasions and said that 'the most stringent protection of free speech would not protect a man in falsely shouting fire in a threatre and causing a panic'; and in Frohwerk v. United States, 249 U. S. 204, 206; we said 'that the First Amendment while prohibiting legislation against free speech as such cannot have been and obviously was not intended to give immunity for every possible use of language.' See also, Debs v. United States, 249 U. S. 211; Abrams v. United States, 250 U. S. 616. In Schaefer v. United States, 251 U. S. 466, commenting on those cases and their contentions it was said that the curious spectacle was presented of the Constitution of the United States being invoked to justify the activities of anarchy or of the enemies of the United States, and by a strange perversion of its precepts it was adduced against itself. And we did more than reject the contention, we forestalled all repetitions of it, and the contention in the case at bar is a repetition of it. It is a direct assault upon the statute of Minnesota, and a direct assertion in spite of the prohibition of the statute that one can by speech, teach or advocate that the citizens of the State should not aid or assist 'the United States in prosecuting or carrying on war with the public enemies of the

United States', and be protected by the Constitution of the United States."

People v. Most, 171 N. Y. 423, 431.

Vann, J., on page 431 says:

"While the right to publish is thus sanctioned and secured, the abuse of that right is excepted from the protection of the Constitution, and authority to provide for and punish such abuse is left to the legislature. The punishment of those who publish articles which tend to corrupt morals, induce crime or destroy organized society, is essential to the security of freedom and the stability of the state. While all the agencies of government, executive, legislative and judicial, cannot abridge the freedom of the press, the legislature may control and the courts may punish the licentiousness of the press. 'The liberty of the press,' as Chancellor Kent declared in a celebrated case, 'consists in the right to publish, with impunity, truth, with good motives, and for justifiable ends, whether it respects governments, magistracy or individuals.' (People v. Croswell, 3 Johns. Cas. 336, 393.) Mr. Justice Story defined the phrase to mean 'that every man shall have a right to speak, write and print his opinions upon any subject whatsoever, without any prior restraint, so always, that he does not injure any other person in his rights, person, property or reputation; and so always, that he does not thereby disturb the public peace, or attempt to subvert the

government.' (Story's Commentaries on the Constitution, Section 1874.)"

Warren v. United States (C. C. A.)
183 Fed. 718, 721.

Hook, Circuit Judge, on page 721, said:

"Liberty and freedom of speech under the constitution does not mean the unrestrained right to do and say what one pleases at all times and under all circumstances, * * * The very idea of government implies some imposition of restraint in the interest of the general welfare, peace, and good order."

State v. Holm, 139 Minnestota, 267,
275.

Taylor, C., on page 275, said:

"Defendants also contend that the statute abridges the freedom of speech and of the press secured to citizens of the United States by the first section of the Fourteenth Amendment to the Federal Constitution. To what extent this amendment takes from the states the power to place legislative restrictions upon the freedom of speech and the freedom of the press is still a mooted question; but conceding that it protects this right from abridgment by the states, the freedom secured thereby is not an unlimited license to speak and to publish whatever one may choose. It is settled that the state may prohibit publications or teachings which are injuri-

cus to society, or which tend to subvert or imperil the governmental duties without infringing the constitutional provisions which preserve freedom of speech and of the press. These constitutional provisions preserve the right to speak and to publish without previously submitting for official approval the matter to be spoken or published, but do not grant immunity to those who abuse this privilege, nor prevent the state from making it a penal offense to publish or advocate matters or measures inimical to the public welfare."

State v. Hennessy, 114 Washington, 351, 359.

Main, J., in quoting from the opinion in State v. Fox, 71 Wash, 185, said at page 359:

"While the constitutions of the United States and of this state guarantee the right to freely speak, write, and publish upon all subjects, it is not meant thereby that persons may with impunity advocate disregard of law; or as was said in People v. Most, 171 N. Y. 423, 64 N. E. 175, 58 L. R. A. 509 'While the right to publish is thus sanctioned and secured, the abuse of that right is excepted from the protection of the constitution, and authority to provide for and punish such abuse, is left to the legislature. The punishment of those who publish articles which tend to corrupt morals, induce crime or destroy organized society is essential to the security of freedom and the stability of the state'."

State v. Boyd, 86 N. J. L. 75, 79:

Parker, J., on page 79, said:

> "The fundamental answer to the point raised is that free speech does not mean unbridled license of speech, and that language tending to the violation of the rights of personal security and private property, and towards breaches of the public peace is an abuse of the right of free speech for which, by the very constitutional language invoked, the utterer is responsible."

The reasons relied upon by counsel for the petitioner for allowance of the Writ are not based on the true facts of the record and the cases cited in support of the petition were decided on grounds entirely different from those that lie in the within conviction.

With counsel's many quotations and extracts enunciating fundamental constitutional principles there is and could be naught but approval, but these laudable expressions bespeak liberty of expression and not the license of disregard of these same principles.

The cases so fully cited by counsel for the defendant are replete with axiomatic pronouncement as to freedom of speech, press and assembly each case in itself gives expression to fundamental constitutional principles, lofty sentiments and truths to which we must subscribe but the principle involved in no one of the cases cited is pertinent to the within case. The occasion for their expression by eminent jurists arose from appeals to the higher courts on facts entirely different and totally dissimilar from those

herein and were decided on grounds entirely different from those that lie in the within appeal.

Petitioner's counsel argues that the petitioner was convicted and his fundamental rights abridged merely to prevent public inconvenience or annoyance ignoring the finding of fact, that enjoying the privilege of free speech and free assembly, he was, as a result of the abuse of the privilege found guilty, not of causing inconvenience or annoyance but of the offense of Disorderly Conduct and he speaks of continuous pervasive restraint on all freedom of discussion, again ignoring his uninterrupted thirty minutes of speaking. Judge Bamerick did not deny to the petitioner any freedom of discussion. He heard the evidence and made a decision giving frankly his reasons therefor. There is nothing ambiguous about the statute under which petitioner was convicted and it most certainly is sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. It is conceded that many statutes have been properly construed by this high court as being vague and indefinite but the clear, concise definite language of Section 722 of the Penal Law of the State of New York is not within such definition or within the decisions in any of the cases cited by counsel. This statute has stood for over a quarter of a century as a proper standard in the measurement of disorder and as an instrument in promoting and protecting an orderly society.

The following comments are offered as to the cases cited by petitioner in support of his application for the Writ.

Arthur Terminiello vs. City of Chicago, 337 U. S. 1.

Counsel sets forth this case as being a complete defense to the defendant Feiner and cites it as a striking parallel. The parallel is only as to the coincidence in the handing down of the decision and the conviction of the defendant in this case. It is similar in that unwholesome and interperate speech was indulged in by the defendant Terminiello which resulted in riot and disorder. The fact that the conviction in the Chicago court was reversed is in no sense an endorsement of the disorder and chaos as being inseparable consequences to freedom of speech and assembly. Counsel argues as if to say: If Terminiello wasn't guilty after causing a riot, how, then, could Feiner be guilty, he having but caused a threatened breach of the peace. Truly a garbled public opinion as to what his case actually decided prevails but no good reasoning will ever stamp it as an endorsement of disorder. Terminiello's guilt or innocence as to his actual acts was never passed upon by the United States Supreme Court nor can the decision be considered as an exoneration for him.

The court passed only on the legality of the conviction in view of an erroneous construction by the trial judge of the ordinances under which he was tried and convicted. It being impossible to tell whether the jury found him guilty wholly or partially by reason of the improper construing of the ordinance or whether the improper construction was a factor in their verdict, yet it was there and could have been the determining factor and the court was very properly constrained to reverse the verdict. There is little doubt that no one of the judges of this high court enter-

tained any doubts as to this defendant's guilt as to his intemperate language being a factor in promoting disorder, but agreed that with a clearly unconstitutional interpretation of an ordinance as a possible determining factor in the jury's decision the court very properly reversed the decision. The constitutionality of the ordinance under which he was tried and convicted was never raised during the trial or appeal but the court, on the case reaching them, did construe it as unconstitutional in the manner interpreted by the trial judge.

In the Terminiello case the interpretation placed on the Chicago ordinance by the trial judge permitted conviction if his speech stirred people to anger, invited public dispute or brought about a condition of unrest and under that construction there could have been a conviction regardless of whether there was a breach of the peace or a threatened breach of the peace.

While in the within case Judge Bameriek made no interpretation of the statute that was in any way violative of the defendant's rights. He, in fact, emphasized the petitioner's rights of free speech and assembly even though the speaker used bad taste, and held that the petitioner was within his strict legal right in speaking intemperately. When the court in their opinion in the Terminiello case, speaking of the function of free speech, said "It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger" they might well have added "but not when it incites to disorder or threatened disorder". I am sure the court had in mind a mental or thinking unrest and not a physical unrest. I believe they

had in mind dissatisfaction which can and should exist without disorder—something that would make them more conscious of the body politic or social; that the "stirring to anger" should be a keen conscious disapproval of existing conditions and not a physical anger that would breed disorder. By the very nature of the basis of decision in the Terminiello case there can be no parallel to the within case.

While not in any manner questioning the majority opinion in this case where the facts concerning the disorder were not passed upon yet the dissenting opinion of Mr. Justice Jackson as therein expressed disregarding the constitutional question of the Chicago ordinance and reasoning from the view point of the actual disorder is such an opinion as covers the precise situation presented in the within case, were the constitutional question of the erroneous charge not present doubtless it would have been a majority opinion.

Mr. Justice Jackson, dissenting, said on page 13:

> "But the local court that tried Terminiello was not indulging in theory. It was dealing with a riot and with a speech that provoked a hostile mob and incited a friendly one and threatened violence between the two."

And in speaking of the trial judges instruction to the jury on page 13 further said:

> "He was addressing his words to the concrete behavior and specific consequences disclosed by the evidence."

He was saying to the jury, in effect, that if this particular speech added fuel to the situation already so inflamed as

to threaten to get beyond police control it could be punished as inducing a breach of the peace.

On page 14 he further said:

> "This Court seems to regard these as enemies of each other and to be of the view that we must forego order to achieve liberty. So it fixes its eyes on a conception of freedom of speech so rigid as to tolerate no concession to society's need for public order.
>
> An old proverb warns us to take heed lest we 'walk into a well from looking at the stars.' "

On page 24 he further said:

> "This drive by tolitarian groups to undermine the prestige and effectiveness of local democratic governments is advanced whenever either of them can win from this Court a ruling which paralyzes the power of these officials."

On page 25 he said:

> "A trial court and jury has found only that in the context of violence and disorder in which it was made, this speech was a provocation to immediate breach of the peace and therefore cannot claim constitutional immunity from punishment. Under the Constitution as it has been understood and applied, at least until most recently, the State was within its powers in taking this action.

And on page 25 he further said:

> "Rioting is a substantive evil, which I take it no one will deny that the State and the City have the right to punish."

On page 27 quoting from Cantwell v. Connecticut, 310 U. S. 296, 309-310. In the latter case Mr. Justice Roberts for a unanimous court said:

> "The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace or order appears the power of the State to prevent or punish is obvious. 310 U. S. 296, 298.
>
> How this present decision, denying state power to punish civilly one who precipitated a public riot involving hundreds of fanatic fighters in a most violent melee can be squared with these unanimous statements of law is incomprehensible to me."

On page 28:

> "However, these wholesome principles are abandoned today and in their place is substituted a dogma of absolute freedom for irresponsible and provocative utterances which almost completely sterilizes the power of local authorities to keep the peace as against this kind of tactics."

On page 29:

"The Constitution of Illinois is representative of the provisions put in nearly all state constitutions and reads (Art. II, Sec. 4). 'Every person may freely speak, write and publish on all subjects *being responsible for the abuse of that liberty*' That is what I think is meant by the cryptic phase 'freedom of speech' as used in the Federal Compact, and that is the rule I think we should apply to the states." (Italics ours.)

On page 31:

"I do not think we should carry this handicap further, as we do today, but should adhere to the principles heretofore announced to safeguard our liberties against abuse as well as against invasion. * * * But if free speech is to be a practical reality, affirmative and immediate protection is required; and it can come only from non judicial sources. It depends on local police, maintained by law abiding taxpayers and who, regardless of their own feelings, risk themselves to maintain supremacy of law."

On page 33:

"Because a subject is legally arguable, however does not mean that public sentiment will be patient of its advocacy at all times and in all manners—hence many speeches, such as that of Terminiello, may be legally permissible but may nevertheless in some surroundings be a menace to peace and order. When conditions show the speaker that this is the case, as it did here, there certainly comes a point beyond which he cannot indulge in provocations to violence without being answerable to society."

On page 34:

"When the right of society to freedom from probable violence should prevail over the right of an individual to defy opposing opinion, presents a problem that always tests wisdom and often calls for immediate and vigorous action to preserve public order and safety.

"I do not think that the Constitution of the United States denies to the states and the municipalities power to solve the problem in the light of local conditions, at least so long as danger to public order is not invoked in bad faith, as a cover for censorship or suppression. The preamble declares domestic tranquility as well as liberty to be an object in founding a Federal Government and I do not think the Forefathers were naive in believing both can be fostered by law."

On page 37:

"In the long run maintenance of free speech will be more endangered if the population can have no protection from the abuses that lead to violence. No liberty is made more secure by holding that its abuses are inseparable from its enjoyment. We must not forget that it is the free democratic communities that ask us to trust them to maintain peace with liberty and that the factions engaged in this battle are not interested permanently in either.

"This Court has gone far toward accepting the doctrine that civil liberty means the removal of all restraints from these crowds and that all local attempts to maintain order are impairments of the liberty of action. The choice is not between order

and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."

From the United States Law Weekly, page 3021 appears the following:

"The Chicago conviction of Father Terminiello for an inflammatory speech was set aside because of an erroneous charge to the jury. *The Court avoided the basic problems of free speech which had been argued to it* and held that the charge to the jury saying the Chicago ordinances permitted a conviction if the speech stirred people to anger, invited public dispute or brought about a condition of unrest and construed the state statute in a manner which violated Terminiello's constitutional right of free speech." (Italics ours.)

Schneider v. State (Town of Irvington) 308 U. S. 147.

This case dealt with the abridgment of the freedom of those rightfully on the street to impart information through speech or the distribution of literature, under the guise that the restriction was to keep the streets clean and a censorship on the distribution of circulars from house to house. It was one of four cases before the court all of which dealt with the restriction on the distribution of literature. Here there was an absolute prohibition that was declared unconstitutional.

Here there was *complete previous restraint* but no disorder. The comment on the importance of preventing restrictions, viewed from the facts of the case, are highly proper but there is no parallel to the within case. In the Feiner case there was no previous restraint of any nature or absolute prohibition.

Jamison v. Texas, 318 U. S. 413.

> In this case the appellant, a member of Jehovah Witnesses, was charged with the distribution of handbills on the streets of Dallas, Texas, in violation of an ordinance of that city that prohibited their distribution. The distribution was quietly done and without any disorder. The City claimed an absolute right to prohibit the use of the streets for the communication of ideas. This Dallas ordinance forbade the expression of views in an orderly fashion.

Here there was an absolute prohibition and the court rightfully held the ordinance to be unconstitutional.

There is not the slightest parallel between the Jamison Case and the within case. There previous restraint and outright prohibition existed; Feiner had his right and exercised it to the extent of abuse.

Schenck v. United States, 249 U. S. 47.

Mr. Justice Holmes, on page 52, says:

> "We admit that in many places and in ordinary

times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends on the circumstances in which it is done. Aikens vs. Wisconsin, 195 U. S. 194, 205, 206. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic * * *

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that will bring about the substantive evils that Congress has a right to prevent."

The people contend that in the Feiner case a substanive evil, not national in scope but of vital local importance could easily have resulted had the officers not checked it before it broke out into actual disorder.

Sellers, et. al. v. Johnson, et. al. 163 F. 2d 877
Circuit Court of Appeals, Eighth Circuit.

This case holds that the fundamental rights to assemble, to speak, and to worship cannot be abridged merely because persons threaten to state a riot or because peace officers believe or are afraid that breaches of the peace will occur if the rights are recognized. Here it was argued that the proposed religious meetings were prevented and the members of the sect were denied the use of the park in the Town of Lacona, Iowa. The Town Council passed resolutions denying such use by the Jehovah's Witnesses and

meetings were prohibited and the members were denied the use of the park. It was held that such action was a violation of the constitutional rights of Jehovah's Witnesses.

There was here a most decided and determined effort to previously restrain the Jehovah's Witness and they were pre-judged before they even assembled or spoke. There is no similiarity to the within case where there was no previous restraint, where the speaker exercised his rights of freedom of speech and of assembly and was checked only when his abuse of the rights treafened a breach of the peace.

Lovel vs. Griffin, 303 U. S. 44.

This was an appeal from the Court of Appeals of Georgia under a municipal ordinance forbidding as a nuisance the distribution by hand or otherwise of literature of any kind without first obtaining a written permission from the City Manager. It was held that the ordinance violated the Fourteenth Amendment in that it struck, as the Court said, at the very foundation of the freedom of the press by subjecting it to a license and censorship. The Court placed the distribution of pamplets and leaflets in the same category as newspapers and periodicals.

Here quite apparently, the ordinance was unconstitutional on its face. The comments by the Court in this case as to freedom of speech are not open to any adverse comment but clearly there is no similarity to the facts in the within case where there is no question as to the constitutionality of the section of the Penal Law of the State of New York under which the defendant Feiner was convicted.

Here in the Feiner case there was no previous restraint, no prohibition on his speaking, only the abuse was checked.

Hague, Mayor, et. al. v. Committee of Industrial Organization, 307 U. S. 496.

This case was before the Court in respect of the asserted privilege and immunity of citizens of the United States to advocate action pursuant to federal statute by distribution of printed matter and oral discussion in peaceable assembly; and the jurisdiction of Federal Courts of suits to restrain the abridgment of such privilege and immunity, and refuse the use of the streets and parks for communication of views on national questions.

In this case there was a denial of the right to hold public meetings and distribute literature. There was a deliberate policy of prevention; there was no breach of the peace and no threatened breach of the peace. The whole issue was whether freedom to disseminate information concerning the purpose of the National Labor Relations Act to assemble peaceably for the discussion of the act and advantages offered by it is a privilege or immunity of a citizen of the United States secured against State abridgment. It also gave the Directory of Public Safety the right to refuse a permit on his mere opinion that such refusal would prevent riots, disturbances or disorderly assemblages—a clear case of previous restraint not present in the Feiner case.

Here the ordinance was declared unconstitutional but the right of regulation was recognized by the Court. Feiner was never denied the use of the street or the free-

dom to express himself. Only the resultant reaction of the crowd to his speech, tending toward a breach of the pease was regulated. There is no parallel to the Feiner case.

Thomas v. Collins, Sheriff, 323 U. S. 516.

This case was before the court on the constitutionality of a Texas Statute that required paid labor union organizers to register with the Secretary of State of the State of Texas and secure an organizers card before soliciting members within the State as applied to a national labor leader who was invited to Texas to address a mass meeting and who in giving a prepared speech invited one person specifically and all hearers generally to join the union and who neither asked nor accepted funds or property for the union at the time of the address or while he was in Texas.

It was held that this statute contravened the First Amendment in abridging free speech and freedom of assembly. In its decision the court made commendable pronouncements on the right of free speech and free assembly, but nothing in the case in any way approaches the issue in the within case of actions and words tending to a breach of the peace.

Thornhill vs. Alabama, 310 U. S. 88.

This case was before the United States Supreme Court on petition of one Byron Thornhill who had been convicted of a violation of Section 3448 of the State Code of 1923 which forbade loitering and picketing. The petitioner was

found guilty after trial without a jury of Loitering and Picketing as charged in the complaint. The employees of Brown Wood Preserving Company had been on strike and Thornhill had requested one man not to go to work. He was arrested, charged and convicted. He petitioned the Supreme Court of the United States to review the conviction on the grounds that the ordinance or section of the code under which he was convicted was unconstitutional in that it was an abridgment of the right of free speech and free assembly. The Court so found.

But again there is no parallel. Thornhill made no remarks to incite a crowd, used no intemperate language nor was there, as there was in the Feiner case, even a threatened breach of the peace.

Murdock v. Pennsylvania, 319 U. S. 105.

This was a case in which the petitioners, members of Jehovah's Witnesses, were convicted and fined for violation of an ordinance of the City of Jeanette, Pennsylvania, in that they failed to procure from the Burgess a license to transact business but went from house to house selling religious tracts and seeking contributions.

There is nothing in this case in any sense in point with the within appeal. In this case there was previous restraint but nothing of any nature tending to a breach of the peace. In the Feiner case there was no previous restraint, he exercised his privilege of freedom of speech and assembly and was restrained only when after thirty minutes his words and their effect on the assembled crowd threatened a breach of the peace.

Board of Education vs. Barnett, 319 U. S. 624.

This was a case involving the refusal of a religous sect to salute the American Flag as violative of their religious views. Their right to so refuse was upheld by this court.

This case likewise is in no sense a case arguable to the issue in the within appeal. Compulsion to do something against one's religious scruples is a thing entirely different from the abuse of a right freely exercised with no previous restraint.

DeJonge vs. Oregon, 229 U. S. 353, 364.

This was a case under the criminal syndicatism law of the State of Oregon. The Defendant, DeJonge, was tried, convicted and sentenced for merely participating at a meeting, otherwise orderly, because the meeting was held under the auspices of the Communist Party.

There is no parallel to the within case against Feiner. In the DeJonge case there was no disorder or breach of the peace. There was in the DeJonge case a very definite curtailment of the freedom of speech and assembly that was never denied to the petitioner Feiner.

Mr. Chief Justice Hughes, on page 364, in reversing the judgment of conviction, says in reference to the rights of free speech and free assembly:

> "These rights may be abused by using speech, press or assembly in order to incite to violence and crime. The People through their legislatures may

protect themselves against the abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed."

It is respectfully submitted that in the Feiner case the People were protecting themselves against the abuse by the exercise of the police power granted through the enactment by the legislature of the section of the Penal Law of the State of New York under which he was convicted. His rights did not extend to the abuse of the freedom, the right itself was not curtailed, only the abuse of the right. That curtailment was necessary to the preservation of the right itself.

Marsh v. Alabama, 326 U. S. 501.

This case holds, and rightfully so, that a state cannot consistently with freedom of religion and the press, guaranteed by the First and Fourteenth Amendments, impose criminal punishment on a person for distributing religious literature on the sidewalk of a company owned town, contrary to regulations of the town's management where the town and the shopping district are freely accessible to and freely used by the people in general even though the punishment is attempted under a state statute making it a criminal thing for anyone to enter or remain on the premises of another after having been warned not to do so. Here there was distribution on private property, the distributor asked for a permit and was refused. Mr. Justice Black in his opinion held that an ordinance con-

pletely prohibiting the dissemination of ideas on the city streets cannot be justified on the ground that the municipality holds title to them. Here a distinction was attempted between the ordinary municipality and company owned towns.

Here again there was an absolute prohibition, a previous restraint, and no disorder or threatened disorder. There is no parallel with the Feiner case where there was no previous restraint and where his remarks caused a threatened breach of the peace while he enjoyed freedom of assembly and of speech.

Connelly vs. General Construction Co., 269 U. S. 385.

This case holds that a criminal statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application lacks the first essential of due process. Oklahoma Compensation Statute, Sections 7255, 7257, imposing severe cummulative punishments upon contractors with the State who pay their workmen less than the current rate of per diem wages in the locality where the work is performed was held void for uncertainty. In this case Mr. Justice Sutherland held that a criminal statute cannot rest on uncertain foundation "The crime and the elements constituting it must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is unlawful for him to pursue." Penal statutes providing the doing of cer-

tain things and providing a punishment for their violation should not admit of such a double meaning that the citizen may act upon the one conception of its requirement and the court upon another.

The decision in the Connelly case is good law but wholly inapplicable in the present case. There is nothing vague or uncertain about Section 722 of the Penal Law of the State of New York. It is submitted that the petitioner, a man above common intelligence, should and did know what the effects of his speech on the crowd would be and was. He was speaking vehemently, in what his attorney sets forth in his own brief, at a protest meeting to protest and criticize the cancellation of authorization previously granted one John Rogge to speak at a public high school. There is no evidence in the record as to why the cancellation was made nor is there an iota of evidence that the cancellation was a threat to civil liberties. The speaker went to the section of the city where he spoke. He went there to do a job and whip up an audience for the meeting to follow. Before he spoke he was decided in his own mind that his civil liberties had been abridged and with this mental attitude he spoke and spoke for a purpose and he knew and dealt in abusive language, he knew he was offensive to others, he disobeyed police instruction. The sections under which he was charged and convicted certainly bear no resemblance in uncertainty to the Oklahoma Compensation Statute. It doesn't take any guess work to understand disorderly conduct. The elements of the offense of Disorderly Conduct are set forth in strikingly intelligible detail; there is not the slightest danger of reading any double meaning into its clear precise wording. This Section of the New York Penal Law has been the clear standard of preservation of order in the State of New York

for scores of years, it was there before the petitioner. Had he read it he would have known it. If he didn't know it his ignorance is no excuse. Had he been furnished with a copy of it or had it been called to his attention he would likely then complain of previous restraint. The trouble is not with the statute but with the petitioner who was indifferent to it.

United States v. L. Cohen Grocery Company, 225 U. S. 81.

This case is one where Chief Justice White rendered an opinion declaring the unconstitutionality of Section 4 of the Food Control Act of August 10, 1917, as amended on October 22, 1919, in denouncing and attaching a penalty of fine or imprisonment to the making by any person of any unjust or unreasonable rule or charge in handling or dealing in or with any necessaries holding that this must be construed as forbidding and penalizing the exaction of any excessive price upon the sale of the commodity.

There might be vagueness or doubt as to what is an unreasonable charge in a commercial transaction but there is no vagueness in the statute herein except an asserted vagueness in the hopes of bringing the within case within the purview of the above referred to decision.

Lanzetta v. New Jersey 306 U. S. 451.

This was a case where a statute of New Jersey penalized "Gangsters" and "membership" in a

"gang" and the statute failed to indicate what constitutes "membership" or how one may join a "gang". The court held that a statute penalizing gangsters and declaring that "any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons who has been convicted at least three times of being a disorderly person or who has been convicted of any crime is a "gangster" is so vague and uncertain in its definition of the offense as to be repugnant to the due process clause of the Fourteenth Amendment.

This case bears no parallel to the within issue. The court based its decision on the vagueness of "membership", "gang", "gangster", but never referred to Disorderly Person for under all jurisdictions what constitutes a Disorderly Person or Disorderly Conduct has been well defined and has a definite and certain meaning to the layman as well as to the courts.

Stromberg v. California, 283 U. S. 359.

The appellant was charged under the California Penal Code, Section 403, which condemns displaying a red flag in a public place or in a meeting place as: A-as a sign, symbol or emblem of opposition to organized government.
B-as an invitation or stimulus to anarchistic action.
C-as an aid to propaganda that is of a seditious nature.

There was a general verdict it being impossible to tell under which clause convicted, the court holding that if any clause was invalid then the conviction could not stand.

Here again there is no parallel to the Feiner case. Such vagueness should be overruled as in the other similar cases but the mere citing of cases where the constitutionality of a statute has been subject to attack for vagueness doesn't read the same defect into another statute merely by the mere assertion and without any showing to back up the assertion.[6] Counsel has failed totally to show in Section 722 of the Penal Law of New York the vagueness that might even raise a question under the cases on vagueness recited in his brief.

M. Kraus & Bros. v. U. S., 327 U. S. 614.

In order to sustain a criminal conviction, regulations prescribed by the Price Administrator under Section 2 (g) of the Emergency Price Control Act to prevent circumvention or evasions of price limitations must be explicit and unambiguous and must adequately inform those who are subject to their terms, what conduct will be considered evasive, the dividing line between unlawful evasion and lawful motion cannot be left to conjecture.

This decision arose out of certain price controls established for the poultry business and combination sales of skin, feet and the chicken itself. There were fixed prices on some parts and none on others, certain dealers insisted on certain poundage of the

less desirable parts of the chicken as a condition to the more desirable portions. Here were involved provisions to prevent circumvention in a highly competitive business practiced in a cutthroat manner that demanded the regulations be definite and certain.

There is no similarity to the present case. The average member of the community observing the current morality as referred to in the People v. Yergan above doesn't need a book of technical rules to guide him in his daily conduct to observe the peace of the community that society demands.

Herendon v. Lowry, 301 U. S. 242.

This was an appeal from the Supreme Court of the State of Georgia. This case holds that a State statute punishing as a crime the acts of soliciting membership for a political party and conducting meetings of a local unit of that party where one of the doctrines of the party established by reference to a document, not shown to have been exhibited to any one by the accused, may be said to be ultimate resort to the violence in the indefinite future, against organized government, unwarrantably invades the liberty of free speech and so violates the Fourteenth Amendment.

Mr. Justice Roberts on page 258 says:

"That power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a

definite character must find its justification in a reasonable apprehension of danger to organized government. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond that need violates the constitution."

Mr. Justice Roberts on page 256 said:

"The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that will bring about the substantive evils that Congress has a right to prevent."

Here was a case where a conviction was had more on the policies and aims of the organization than on individual acts done. This case is not decisive of the problem in the within case. In the Feiner case there was no question of a resort to violence in the indefinite future. There was a then present issue of immediate pending disorder; there wasn't any danger to organized government but there was an immediate danger of a breach of the peace. The peace and quiet of that community where the speech was being made was then being threatened. A breach of the peace in that particular community would have been such a substantive evil locally as the State Legislature had a right to seek to prevent by the provisions of Section 722 of our Penal Law.

Saia v. New York, 334 U. S. 558

This case holds that a city ordinance forbidding the use of a sound amplification device in pub-

lic places except with the permission of the Chief of Police and prescribing no standards for the exercise of his discretion is unconstitutional on its face since it establishes a previous restraint on the right of free speech in violation of the First Amendment.

As to the use of a loud speaker in the instant case the attention of the court is called to the fact that the use of such a device was never a factor in the trial in the Syracuse, New York, Court of Special Sessions, only insofar as counsel for the petitioner tried to infuse it into the trial. Its mention in the information as referred to was merely incidental. He never was the defendant in a charge wherein the use of a loud speaker in violation of an ordinance was charged.

On page 71 of the record Judge Bamerick conceded that the use of such a device "in and of itself is perfectly proper" and again on page 138 of the record the court said "Now there is no question about the right of any citizen, including yourself to use a sound truck for the purpose of delivering an address, and I have no dispute or difference with any of the decisions of the United States Supreme Court or any court on that subject. You had a perfect right to appear there and to use that implement, the loud speaker. You had a right to have it on the street. There is no question about that." What could be clearer than that? Judge Bamerick never considered the use of the loud speaker as an element in the charge or as a factor in his finding the petitioner guilty.

Winters v. New York, 333 U. S. 507

This case was before this court on a construction of Subdivision 2 Section 1411 of the New York Penal Code and as construed by the Court of Appeals to the effect of prohibiting the distribution of a magazine principally made up of news stories of criminal deeds of bloodshed or lust so massed as to become vehicles for inciting violent and depraved crimes against the person was held to be so vague and indefinite as to violate the Fourteenth Amendment by prohibiting acts within the protection of the guaranty of free speech and press.

A vague statute should be declared unconstitutional but it is again submitted that there is no comparable analogy between the definiteness that should accompany such restrictions so that a distributor would know what type he could dispose of and what type he couldn't distribute and a knowledge of what constituted a breach of the peace. It is no more possible to enumerate the acts that promote disorder and breach of the peace than it is to list the acts and attributes that spell out good behavior and law abiding conduct. This bid to read vagueness into the Disorderly Conduct statute has no merit.

The use of a loud speaker was never an issue in the trial of the defendant's case in the Court of Special Sessions of the City of Syracuse and his conviction in that Court.

The mention of a loud speaker in a bill of particulars is as far as the use of a loud speaker ever was considered

by the People. Its use was not questioned at the trial other than by the defendant's counsel and the legality of its use was conceded by the prosecution and the trial judge. Its use was never a factor in the judge of the court in arriving at his findings of guilty. Its use was definitely referred to by the judge as being strictly within the defendant's legal rights.

In a motion made by the attorney for the petitioner prior to the trial in Syracuse, New York, Court of Special Sessions, he made much of the reference to a loud speaker by reason of the fact that its use was mentioned in an information and tried to spell out a charge as to its use as such. It will be observed that in deciding and denying the motion the judge of that court made clear the petitioner's right to use such a device, an attitude toward its use that he took and maintained throughout the trial and in his decision specifically ruled out such use as being in any sense the basis of his finding of the petitioner guilty.

CONCLUSION

THE WRIT OF CERTIORARI SHOULD BE DENIED.

Petitioner has not made any showing to substantiate his assertions that the New York State Court of Appeals, in their decision, in any way rendered the same in conflict with any controlling Federal decisions applicable to the within facts. The arguments advanced by counsel are not based on the facts as actually found and the decisions cited are not applicable to the true facts. No abridgment of the freedom of speech or freedom of assembly, the

basis of the within review, is involved or has any such abridgment been shown. The decisions of the Syracuse, New York, Court of Special Sessions, the County Court of the County of Onondaga, New York, and the Court of Appeals of the State of New York were in each instance made in consonance with and with full regard and consideration of the petitioner's constitutional rights. No conflict exists between these decisions and any decision of this high court applicable to facts similar to those herein. The Writ of Ceriorari should be denied and for the reasons above and herein stated the judgment of the court below should be affirmed.

Respectfully submitted,

JESSE E. CANTOR,
District Attorney

By DAN J. KELLY,
Assistant District Attorney
Office & P. O. Address
409 Court House
Syracuse, New York

OPINION OF JUDGE LEO W. BREED
(Not reported)

COUNTY COURT—County of Onondaga.

The People of the State of New York
Respondent.

-vs-

Irving Feiner,
Appellant.

APPEARANCES::

Sidney Greenberg, Esq., Attorney for Appellant.

Dan J. Kelly, Esq., Assistant District Attorney of the County of Onondaga, Attorney for Respondent.

BREED, J.

This is an appeal from a judgment convicting the appellant of a violation of Section 722 of the Penal Law of the State of New York in the Court of Special Sessions of the City of Syracuse. The appeal is taken upon the following grounds: 1. That the People did not prove beyond a reasonable doubt that the defendant committed the acts charged; 2. That the conviction of the defendant was invalid as an abridgment of the freedom of speech and of assembly guaranteed by the First and Fourteenth Amendments of the Federal Constitution and Article 1, Section 8 of the State Constitution; and 3. That the sentence of the Court was excessive. Section 722 of the Penal Law reads in part as follows:

"Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct;

1. Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior;

2. Acts in such manner as to annoy, disturb, interfere with, obstruct or be offensive to others;

3. Congregates with others on a public street and refuses to move on when ordered by the police."

The test in each case is whether defendant's conduct, under all the circumstances led to or was likely to lead to disorder or public disturbance. People v. Vogt, 178 Misc. 446 People vs. Bellows, 281 N. Y. 67.

It has been held that it is not essential that there be an actural breach of the peace. Of course, where there is no breach of the peace, there must be proof of circumstances which would form a logical basis for the opinion that the conduct tends to a breach of the peace. People vs. Sadowsky, 149 Misc. 583. People vs. Galpern, 259 N. Y. 279. After reviewing the evidence in this case I conculde that there was sufficient evidence to show that the appellant's deportment was offensive and insulting, that it caused a crowd of about seventy-five people to gether upon the street and sidewalk; that it impeded pedestrians desiring to use the sidewalk; that the crowd showed evidence of unrest and some of them threatened violence to such an extent that the officer came to the conclusion that if it continued, disorder would result The police apparently, in order to maintain peace and prevent disorder in the neighborhood, asked the appellant to desist and when his order was disobeyed he made the arrest.

From the evidence in this case I feel that the officer was justified in drawing the conclusion that unless the appellant desisted in his talk that disorder and violence would result. Police officers are guardians of the public order. It is their duty to prevent disorder in the community and as such they may give reasonable directions. In this case the police officer asked the appellant to stop talking, apparently in an effort to prevent disorder. This the appellant did not do but persisted in the continuance of his talk and the arrest followed. In my opinion the evidence was sufficient to support a finding that the appellant was guilty of the offense charged. People vs. Nixon, 248 N. Y. 182.

Upon the argument of the appeal the appellant laid great stress upon his constitutional right of freedom of speech. There is no doubt but that the right of free speech is guaranteed by the Federal and State Constitutions, but our Courts have held that the constitutional right of freedom of speech is not absolute, but is subject to such reasonable regulations as are necessary to promote and preserve the public peace. In Whitney vs. California 274 U. S. 357, the Court said:

> "That the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose or an unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom; and that a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threa-

ten its overthrow by unlawful means, is not open to question Gitlow vs. New York, 268 U. S. 562, 666-668, and cases cited."

Likewise, in the case of Cantwell vs. Connecticut, 310 U. S. 296, the Court, in its discussion of the question, said:

"The offense known as breach of the peace embraces a great variety of conduct destroying or menancing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets or other immediate threat to public safety, peace or order appears, the power of the State to prevent or punish is obvious."

Under the circumstances, I do not feel that the constitutional rights of the appellant have been violated.

As to the third ground raised by the appellant, that the sentence of the Court was excessive, the law provides that the offense of disorderly conduct is punishable for a term of imprisonment not exceeding six months or by a fine not exceeding Fifty Dollars, or by both such fine and imprisonment. The sentence in this case was 30 days in the Onondaga County Penitentiary. I cannot say that the sentence imposed was excessive. The Judgment of conviction and sentence imposed thereunder is therefore affirmed, and it appearing from the records of this Court that the appellant was released on bail pending the outcome of this appeal, it is

ORDERED that the appellant present himself in person before this Court on August 17th, 1949, at 10:00 o'clock in the forenoon to render himself in execution of the judgment.
Dated at Syracuse, N. Y.
August 5th, 1949.

LEO W. BREED
Onondaga County Judge

OPINION OF THE NEW YORK STATE COURT OF APPEALS

The People of the State of New York
Respondent.

-vs-

Irving Feiner,
Appellant.

Decided March 2, 1950

APPEAL, by permission of an Associate Judge of the Court of Appeals, from a judgment of the Onondaga County Court, entered August 8, 1949, which affirmed a judgment of the Court of Special Sessions of the City of Syracuse (Bamerick, J.), convicting defendant of disorderly conduct in violation of subdivision 2 of section 722 of the Penal Law.

SIDNEY H. GREENBERG for appellant.

REUBEN T. URETSKY for New York State Civil Rights Congress, amious curiae, in support of appellant's position.

JESSE E. CANTOR, District Attorney (Dan J. Kelly of counsel, for respondent.

CONWAY, J. Defendant was convicted of the offense of disorderly conduct (Penal Law, Sec. 722) in the Court of

Special Sessions of the City of Syracuse. The conviction was affirmed by the Onondaga County Court and the case is here by permission of a Judge of this court.

On the evening of March 8, 1949, defendant, Irving Feiner, a student at Syracuse University, was addressing a group of people on South McBride Street, near Harrison Street, in the City of Syracuse. A complaint concerning the gathering was received over the telephone by the police department and two officers, Flynn and Cook, were dispatched to the scene to investigate. That was about 6:30 P. M. Officer Flynn, an acting sergeant, arrived in a police car about twelve or thirteen minutes later and found officer Cook already there in another police car. They observed a crowd of approximately seventy-five or eighty people, both colored and white, gathered near defendant, who was standing on a large wooden box, situated between the sidewalk and a parked automobile on South McBride Street. The automobile was about forty or forty-five feet from the corner and the crowd extended to about twenty or twenty-five feet from the corner. The crowd covered an area of about fourteen by thirty-five feet.

Defendant was speaking into a hand microphone which was attached to loud-speakers on the automobile. Between five and ten associates of defendant were present. They distributed circulars and helped set up the sound amplification apparatus. Defendant was exhorting his listeners to attend a meeting to be held that night in the Syracuse Hotel. In the course of his remarks, defendant "called Mayor Costello (of Syracuse) a champagne (sic) sipping bum and President Truman a bum. He referred to the American Legion as Nazi Gestapo agents — he also said the fifteenth Ward was run by corrupt politicians and that horse rooms were operating."

The crowd gathered by the defendant filled the space between the curb and the building line on the sidewalk. Pedestrians, trying to use the sidewalk, were forced to step out to walk in the street. Some of the crowd spread out into the street, and, since traffic was passing at the time, the officers attempted to get the people back on the sidewalk. As officer Cook approached the scene earlier in the police car, he "had to slow down pretty near to a stop at that point" because of the pedestrians in the street.

Officer Flynn further observed that there was "angry muttering" throughout the crowd and he had trouble getting through it. The crowd was restless. There was some pushing and shoving. They were milling around back and forth. Remarks were being made in the audience both for and against the speaker. "Some were calm and some were not—they were discussing the speech pro and con." There was however, no disorder. After telephoning the police station from a nearby store, Flynn returned to the police cars with Cook and then they crossed the street and mingled with the crowd.

Defendant was speaking in a loud, high-pitched voice and was appealing to the colored people in particular. Defendant said that the negro people did not have equal rights and that they should rise up in arms and fight for them. Flynn got the "impression" that defendant was trying to arouse the Negro people against the whites. Defendant's statement that the Negro people should rise up in arms and fight "stirred up a little excitment" and the crowd "seemed to mill around a little then." One man approached the officers and said "if you don't get that 'son of a bitch' off, I will go over and get him off there myself." Other persons made remarks about the police force not being able to handle the

crowd and that "they did not see why they had to put up with that kind of stuff in the neighborhood."

At this point, Flynn "figured it had gone far enough". The crowd was "getting to the point where they would be unruly." Although there had been no actual disturbance, Flynn said, "we stepped in to prevent it from resulting in a fight." Flynn approached the defendant, not for the purpose of arresting him, but to get him to break up the congregation. He asked defendant to get down off the box but the latter "just looked, and kept right on talking to the crowd." Flynn waited a minute and then demanded that he get down, but defendant still refused. The crowd, which was not quiet, was pressing closer around defendant and the officer. Finally, Flynn told defendant he was under arrest and reached up to grab him. Defendant stepped down off the box and announced over the microphone that "The law has arrived, and I suppose they will take over now." In all, Flynn had asked defendant to get down three times over a space of four or five minutes. Officer Flynn had been present at the scene about fifteen or twenty minutes and Cook about twenty-five or thirty minutes. Defendant, of course, had been speaking for some time longer than a half hour.

On his case, in addition to character witnesses from the faculty of Syracuse University, defendant introduced evidence controverting the officers' testimony concerning the size and temperament of the crowd, the degree of obstruction of the sidewalk and street, the substance of the talk, and defendant's response to the officer's request. Portions of this testimony corroborated elements of the People's case; portions were not believed by the Trial Judge.

On the evidence, the Special Sessions Judge found defendant guilty of disorderly conduct under section 722 of

the Penal Law. In section 722, the Legislature has enumerated certain acts which, if committed with intent to provoke a breach of the peace, or which, even without such intent, may reasonably occasion a breach of the peace, render the actor guilty of disorderly conduct. The section provides in part as follows:

"Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:

"1. Uses offensive, disorderly threatening, abusive or insulting language, conduct or behavior;

"2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;

"3. Congregates with others on a public street and refuses to move on when ordered by the police;"

Defendant was charged with and found guilty of a violation of subdivision 2 of section 722, but it is settled that the judgment of conviction in a case such at this will be affirmed if the evidence establishes a violation of any of the subdivisions of the section. (People vs. Hipple, 263 N. Y. 242, 244.)

In finding the defendant guilty, the court, in an oral decision addressed to defendant, said: *** You had a perfect right to appear there and to use that implement, the loud speaker. You had a right to have it in the street. There is no question about that. ***" The court further assumed that defendant had a legal right to refer to Mayor Costello and O'Dwyer, President Truman and the American Legion in abusive and disrespectful terms. The Trial Judge then reviewed the evidence pointing out the size of the crowd gathered by defendant, the blocking of the sidewalk, the neces-

sity for pedestrians to walk out on the roadway and the unrest and hostility engendered in a portion of the crowd. He continued:

"Now, under those circumstances I think the officers were fully justified in feeling that a situation was developing which could very, very easily result in a serious disorder. I think the officers were very patient up to that time. I think on the basis of the evidence here that you deliberately agitated and that in every way that you could, you goaded these officers to action. ***

"***I think they (the police officers) had every reason in the world to believe, on the basis of the facts that they have testified to, that something serious was about to happen. And then the Officer asked you to get down off the box, and he asked you again, and then one of the officers says he took you by the arm or reached for you. Three times you had to be requested to get off the box. I think that all those facts that have been testified to here are sufficient to sustain the charge of Disorderly Conduct. ***

"I find on the facts that you are guilty as charged in the Information and Warrant."

The findings contained in the decision of the Trial Judge sufficiently establish that defendant, under section 722 and our cases construing it, was guilty of disorderly conduct — putting aside, for the moment, constitutional objections to the conviction.

The statement made by the Trial Judge to defendant that "on the basis of the evdence here *** you deliberately agitated and *** in every way that you could, you goaded these officers to action" was clearly a finding that defendant, by his conduct under the circumstances, intended to provoke a breach of the peace. Certainly defendant acted "in such

a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others", within the meaning of subdivision 2 and such conduct, in conjunction with an intent to provoke a breach of the peace is sufficient in itself to establish the offense of disorderly conduct. The defendant's conduct, at the very least, was such that it tended to disturb the public peace and quit and to occasion a breach of the peace. That under our cases, is sufficient. (People v. Nixon, 248 N. Y. 182-188-189; People v. Galpern, 259 N. Y. 279, 281-282, 284-285; People v. Hipple, supra; People v. Monnier, 280 N. Y. 77, 78-79; People v. Edel 286 N. Y. 637.) It is clear, apart from constitutional objections, that defendant's refusal to accede to the requests of the police officer within the scope of his lawful authority justified defendant's arrest and subsequent conviction for disorderly conduct. (People v. Nixon, supra; People v. Galpern, supra.)

Defendant's main contention on this appeal is that his conviction of the offense of disorderly conduct violates the right of freedom of speech guaranteed by our Federal and State Constitutions. We assume that the constitutional question was properly raised below, even though defendant's attorney did not sepcifically move on the record to dismiss *on that ground*, for both courts below considered it.

It is perhaps laboring the obvious and oft-repeated to state that the constitutional guarantee of freedom of speech is not an absolute right to be indiscriminately exercised under all circumstances and conditions. Social welfare requires, in certain instances, reasonable regulation of freedom of speech which, unrestrained, would produce calamitous or undesirable results — not only for the locality and public order but also, in the long run, for the individual involved. The preservation of order and the prevention of

disturbance are of prime importance to the State. As was said in Cox v. New Hampshire 312 U. S. 569, 574 (Hughes, Ch. J.,): "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recongnition of social need. * * *"

In the instant case, we have a situation in which on a public street a portion of defendant's audience became enraged and aroused at his utterances. Others were sympathic and were present for the specific purpose of assisting and applauding the efforts of the defendant. The crowd became restless and potentially unruly. It filled the sidewalk and spilled out into the adjacent thoroughfare obstructing or impeding both pedestrain and vehicular traffic. An imminent danger of a breach of the peace, of a distrubance of public order; perhaps even of riot, was threatened. Defendant, at the very least, knew of the condition and was heedless of the potential evil consequences. More, as found by the trial court, he deliberately continued in a vein calculated to precipitate those consequences. We do not think, under those circumstances, that defendant had a constitutional right to disregard the police officer's words of warning with impunity and to continue to blare out his provocative utterances over loud-speakers to a milling, restless throng composed of hostile and sympathetic listeners. Where both

the audience and the speaker are inevitably proceeding toward an eruption of civil strife — where, indeed, both seem to be working up to a pitch where serious disorder might well be expected — the power and duty of the State to punish the speaker who refuses to desist after appropriate warning is clear.

Justice Roberts stated the relevant considerations well in Cantwell v. Connecticut (310 U. S. 296, 308) as follows: "The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility, it includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious. Equally obvious is it that a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions. ****"

In the instant case, there is no indication that the action of the police officer was taken as a subterfuge or excuse for suppression of defendant's views and opinions. The courts below have found, and we are bound by the finding, that the officer was motivated solely by a proper concern for the preservation of order and the protection of the general welfare, in the face of an actual interference with traffic and an imminently threatened disturbance of the peace of the community.

We are well aware of the caution with which the courts should proceed in these matters. The intolerance of a hostile audience may not, in the name of order, be permitted to silence unpopular opinions. (49 Col. L. Rev. 1118.) The Constitution does not discriminate between those whose ideas are popular and those whose views arouse opposition or dislike or hatred — guaranteeing the right of freedom of speech to the former and withholding it from the latter. We recognize, however, that the State must protect and preserve its existence, and, unfortunate as it may be, the hostility and intolerance of street audiences and the substantive evils which may flow therefrom, are practical facts of which the courts and the law enforcement officers of the State must take notice. Where as here, we have a combination of an aroused audience divided into hostile camps, an actual interference with traffic and a speaker who is deliberately agitating and goading the crowd and the police officers to action, we think a proper case has been made out, under our State and Federal Constitutions, for punishment.

Defendant's principal, but mistaken, reliance is upon the recently decided case of Terminiello v. Chicago (337 U. S. 1, 5). There the Supreme Court reversed the conviction of the defendant upon the ground that it might have been based upon certain instructions of the Trial Judge to the jury authorizing a verdict of guilty if defendant's speech stirred the people to anger, invited dispute or brought about a condition of unrest. It there appeared that the speech of Terminiello was delivered in a private hall or auditorium and not upon the public street. In the abstract, no one may disagree with the proposition that a person cannot constitutionally be convicted for doing no more than delivering a speech which stirs people to anger, invites dis-

pute or brings about a condition of unrest. That, however, is not the instant case. Here the defendant, as indicated above, disrupted pedestrian and vehicular traffice on the sidewalk and street, and, with intent to provoke a breach of the peace and with knowledge of the consequences, so inflamed and agitated a mixed audience of sympathizers and opponents that, in the judgment of the police officers present, a clear danger of disorder and violence was threatened. Defendant then deliberately refused to accede to the reasonable request of the officer, made within the lawful scope of his authority, that the defendant desist in the interest of public welfare and safety.

We conclude that defendant was properly convicted of the offense of disoredly conduct and that his conviction, under the circumstances, does not infringe upon his constitutional right to freedom of speech.

The judgment should be affirmed.

LOUGHRAN, CH. J., LEWIS, DESMOND, DYE, FULD AND FROESSEL, JJ., CONCUR.

Judgment affirmed.